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In the Supreme Court of the United States

October Term, 1989

ASSISTANT SECRETARY CHARLES R. DAVOLI, LOUISIANA DEPARTMENT OF CORRECTIONS; WARDEN DONALD R. GUILLORY, AND MEDICAL SUPERVISOR LINDA MILLS, WADE CORRECTIONAL CENTER;
Petitioners,

v.

NURSE JANICE FRAZIER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. When a state official performs his or her official duties in an unconstitutional manner and suit is brought in federal court pursuant to 42 U.S.C. § 1983 for retroactive money damages, is the state official automatically stripped of his or her official or representative character, depriving the state official of the Eleventh Amendment immunity and making him or her a person within the meaning of § 1983, thus allowing the suit to proceed against the state official in his or her individual capacity?

[NOTE: Petitioner reserves the right to urge Questions 2, 3, 4 and 5 in the event certiorari is granted on the above question, but does not include Questions 2, 3, 4 and 5 among the reasons for the grant of certiorari.]

2. Does federal or state law govern the applicability of claim preclusion in a suit brought pursuant to 42 U.S.C. § 1983 after an unreviewed state agency adjudication?

3. If preclusion does not apply, should the Fifth Circuit have remanded the case back to the District Court for a trial on the merits on the issue of liability? Did the state officials violate the First Amendment?

4. Were the state officials entitled to the defense of qualified immunity against retroactive money damages as a matter of law and fact?

5. Did the District Court have the authority to adjudicate the pendent state law claims?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals for the Fifth Circuit were the petitioners, Assistant Secretary Charles R. Davoli, Medical Supervisor Linda Mills, Warden Donald R. Guillory and respondent Nurse Janice Frazier.

Secretary John T. King, Undersecretary Michael Martin, Investigator Edward Mills, Louisiana Department of Corrections and Assistant Warden Robert Henderson, Wade Correctional Center, were also parties to the proceedings before the United States District Court for the Western District of Louisiana.

The petitioners before This Court are Assistant Secretary Charles R. Davoli, Medical Supervisor Linda Mills, and Warden Donald R. Guillory. The respondent before This Court is Nurse Janice Frazier.

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No. _____

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Petitioners,

v.

NURSE JANICE FRAZIER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Assistant Secretary Charles R. Davoli, Warden Donald R. Guillory and Medical Supervisor Linda Mills respectfully pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Fifth Circuit, entered on May 30, 1989 and June 29, 1989.

OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit is reported. A copy of the

denial of the rehearing en banc by the Fifth Circuit is reported at 878 F2d 1435 and is attached to this petition as Exhibit A of the Appendix to the petition. A copy of the opinion of the Fifth Circuit affirming the judgment of the District Court is reported at 873 F2d 820 and attached to this petition as Exhibit B of the Appendix to the petition. The judgment and opinion of the United States District Court for the Western District of Louisiana are unreported. The judgment of the District Court is attached to this petition as Exhibit C of the Appendix to the petition. The opinion of the District Court is attached to this petition as Exhibit D of the Appendix to the petition. The order on preclusion is attached to this petition as Exhibit E of the Appendix to the petition. The memorandum opinion on preclusion is attached to this petition as Exhibit F of the Appendix to this petition.

JURISDICTION

Nurse Janice Frazier, a registered nurse at Wade Correctional Center, an adult prison operated by the Louisiana Department of Corrections, brought suit against numerous officials of the State of Louisiana in both their official and individual capacities under 42 U.S.C. § 1983 for violations of her rights under the First and Fourteenth Amendments and pendent state law claims of retaliatory discharge and intentional infliction of emotional, physical, and mental injuries.

The parties filed for summary judgment. The District Court dismissed Nurse Frazier's Fourteenth Amendment claim and dismissed Assistant Warden Robert Henderson, but allowed her suit to proceed on all other claims against the remaining defendants. Prior to trial,

the District Court ruled that a finding by the Louisiana Civil Service Commission that the Louisiana Department of Corrections violated Nurse Frazier's First Amendment right when she was terminated from her employment precluded relitigation of that issue. The finding of the Louisiana Civil Service Commission is attached to this petition as Exhibit G of the Appendix to the petition. A three (3) day bench trial on the issues of qualified immunity, the pendent state law claims, and damages was held. The District Court dismissed Secretary John T. King, Undersecretary Michael Martin and Investigator Edward Mills. As to Assistant Secretary Charles R. Davoli, Warden Donald R. Guillory, and Medical Supervisor Linda Mills, the District Court rejected their affirmative defense of qualified immunity, dismissed Nurse Frazier's pendent state claim for retaliatory discharge and granted her pendent state claim for intentional infliction of emotional distress. The District Court awarded Nurse Frazier Fifty Thousand and NO/100 ($50,000.00) Dollars for loss of her voice, Twenty Thousand and NO/100 ($20,000) Dollars for mental anguish and suffering, Ten Thousand and NO/100 ($10,000.00) Dollars in lost wages and Twenty Five Thousand and NO/100 ($25,000.00) Dollars in punitive damages. Paul Henry Kidd, Counsel for Nurse Frazier, was, following a hearing, awarded Thirty Thousand One Hundred and Forty and NO/100 ($30,140.00) Dollars in attorney's fees.

Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills appealed the judgments of the District Court to the United States Court of Appeals for the Fifth Circuit. On appeal they urged that (1) they are entitled to Eleventh Amendment immunity and qualified

immunity; (2) the prior Louisiana Civil Service Commission adjudication precludes Nurse Frazier's § 1983 claim, and alternatively if it does not, they are not precluded from relitigating the issue of their liability; (3) they were denied due process to contest liability; (4) Nurse Frazier is not entitled to lost wages; (5) the District Court erred in awarding compensatory and punitive damages; and (6) the attorney's fee awarded was improper. A Three (3) judge panel of the Fifth Circuit, after briefing and oral argument, issued on May 30, 1989, an opinion affirming the District Court's judgments. The Fifth Circuit by a Two (2) to One (1) decision, determined that the District Court erred in applying the doctrine of claim preclusion and that issue preclusion does not apply based on Louisiana law. The Court of Appeals then determined, based on its review of the record, that Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills violated Nurse Frazier's First Amendment rights. The Eleventh Amendment immunity defense was denied. The District Court's ruling on the qualified immunity was upheld. The awards of damages and attorney's fees were upheld. Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills filed a timely petition for rehearing en banc which was denied on June 29, 1989.[1]

[1]The dismissal of Secretary John T. King, Undersecretary Michael Martin, Assistant Warden Robert Henderson and Investigator Edward Mills by the District Court was not appealed to the Fifth Circuit by Nurse Frazier. They are not, therefore, parties before This Court. Paul Henry Kidd, counsel for Nurse Janice Frazier before the District Court, cross-appealed on the amount of attorney's fees awarded to him. Paul Henry Kidd's argument on the award of attorney's fees by the District Court was briefed before the Fifth Circuit.

The jurisdiction of This Court to review the opinions of the United States Court of Appeals for the Fifth Circuit is invoked under 281 U.S.C. § 1254 (1) and § 1259.

STATUTES INVOLVED

A Constitutional provision involved is the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

A Constitutional provision involved is the Eleventh Amendment to the United States Constitution:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or Subjects of any Foreign State."

A Constitutional provision involved is the Fourteenth Amendment to the United States constitution which reads in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

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The Court of Appeals' holding on attorney's fees presumably disposed of this cross-appeal. The amount of attorney's fees awarded to Paul Henry Kidd is not being brought to This Court by the petitioners, Assistant Secretary Davoli. Warden Guillory or Medical Supervisor Mills.

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." .....

"Section 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The statute involved in this case is 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The Louisiana Statute involved in this case is Louisiana Civil Code Article 2315:

"Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service and society and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brother and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively."

STATEMENT OF THE CASE

In May of 1981, Nurse Frazier was hired by the Louisiana Department of Corrections as a registered nurse to work in the infirmary at Wade Correctional Center, an adult prison. Shortly after she began working as a nurse at Wade Correctional Center, Nurse Frazier began reporting alleged improprieties in regards to medical procedures being used at the prison's infirmary. Nurse Frazier first reported these to her superior at the prison infirmary, Medical Supervisor Mills. She then reported them to the prison administration, first to Assistant War-

den Robert Henderson, then to Warden Guillory. In the summer of 1983, Nurse Frazier spoke to the Supervisor of Nursing at the Headquarters level of the Louisiana Department of Corrections. An investigation by Headquarters determined that Nurse Frazier's complaints were well-founded. Despite this, the conditions Nurse Frazier complained about were not remedied.

In December of 1982, Nurse Frazier told Warden Guillory that unless the conditions she complained about were corrected, she would go to the media and the Louisiana State Board of Nursing. Warden Guillory told her that if she did he would fire her. Nurse Frazier contacted the Secretary of the Louisiana Department of Corrections, John T. King, and an official with the Louisiana State Board of Nursing. Nurse Frazier provided copies of prisoners' medical records to the Louisiana State Board of Nursing. On some of these medical records Nurse Frazier obtained consent of the individual prisoner, on others she did not.

In January of 1983, the Louisiana State Board of Nursing charged Medical Supervisor Mills with violations of the Louisiana Nursing Practices Act. A consent agreement was entered into between Medical Supervisor Mills and Louisiana State Board of Nursing in May of 1983.

Secretary John T. King sent Assistant Secretary Davoli to Wade Correctional Center in February and April of 1983 to investigate the prison infirmary for violations of the Louisiana Nursing Practice Act. At the end of the investigation, among other things, Assistant Warden Davoli filed an employee disciplinary report against

Nurse Frazier charging that she copied prisoner medical records without their consent in violation of Louisiana Department of Corrections Employees Rules and Procedures, Rule Number 13 (K). Assistant Secretary Davoli recommended that Nurse Frazier's employment with the Louisiana Department of Corrections be terminated.

The employee disciplinary report written by Assistant Secretary Davoli went through Louisiana Department of Corrections' three (3) level internal hearing and review process. Warden Guillory was the first level hearing officer during this process. At the conclusion of that process, Assistant Secretary Davoli signed the paperwork on behalf of Secretary John T. King, terminating Nurse Frazier's employment with the Louisiana Department of Corrections.

Nurse Frazier appealed her termination to the Louisiana Civil Service Commission. The respondent-appellee before the Louisiana Civil Service Commission was the Louisiana Department of Corrections, Wade Correctional Center. After a hearing, the Referee for the Louisiana Civil Service Commission found that:

> "The Referee concludes that the Department of Corrections has failed to sustain the burden of showing that the disciplinary action taken was warranted in this case. Appellant is charged, by the Department of Corrections with releasing confidential inmate medical records to the Louisiana Board of Nursing. The real, unwritten charge however, is that appellant breached her duty of loyalty to support her superiors and maintain silence regarding internal agency affairs.
>
> The Referee further concludes that appellant

was legally, morally and ethically obligated to pursue the course of action that she did. Appellant tried unsuccessfully to bring about changes in the nursing practices at Wade by first going through the chain of command at Wade. The Nursing Practices Act provides that not only can a registered nurse be disciplined for nursing practices that adversely affect the physical and psycho-social welfare of a patient; but, can also be disciplined for failure to report such practices. Under these circumstances, the Appellant's duty to report such violations to her licensing authority and to submit documentation in support thereof far outweighed her obligation to follow the Department of Corrections rules and regulations. In *Department of Corrections v. Cage*, 418 So. 2d 3 (La. App. 1st Cir. 1982) the Court implied that if an agency's policy and order does not ask the employee to do anything illegal, immoral, unethical or in dereliction of the employee's duties, the employee is bound to follow the order. Obviously, this was not the case in this appeal.

The public interest in having free and unhindered debate on matters of public importance is the core value of the Free Speech Clause of the First Amendments of the United States and Louisiana Constitutions. Equally as important is the right of the employee to engage in such speech without the threat of retaliatory dismissal by their employer. The rights of inmates to adequate medical care has been, for at least the last decade, a central issue in the Courts, and needless to say is of paramount concern to the public at large. "Speech concerning public affairs . . . . . is the essence of self-government." See *Garrison V. Louisiana*, 379 U. S. 64 74 - 75, 85 S.Ct. 209, 215 - 216. Such speech occupies the "highest rung of the hierarchy of First Amendment values and is

entitled to special protection." See *Connick V. Myers*, 103, S. Ct. 1684 (1982) and *Pickering V. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 20 L. Ed. 2d 811.

For the foregoing reasons, the Referee concludes that appellant's constitutional right to speak out about the nursing practices at Wade and to supply the nursing board with copies of inmate medical records is significantly outweighed by the Department of Corrections need to maintain discipline among its employees. The public interest is best served by appellant's actions and those of the Department of Corrections. Additionally, appellant's actions promoted the efficiency of the service rendered. See: *Legett v. Northwestern State College*, 140 So. 2d 5 (1962).

Accordingly, this appeal is granted. Appellant is to be reinstated to her position effective August 19, 1983, subject to an offset in favor of the appellee for all wages earned and unemployment compensation received by appellant during the time of her illegal separation. All references to the termination are to be expunged from appellant's personnel folder. Pursuant to Civil Service Rule 13.35 attorney's fees in the amount of $500.00 are awarded and are to be paid to appellant and her attorney jointly. Some disciplinary action should have been taken by the Department of Corrections in light of the facts presented in this case, but not against this employee. The Department of Corrections actions herein were blatantly unreasonable."

The Louisiana Department of Corrections did not appeal the Referee's opinion to the Louisiana Civil Service Commission or the appropriate Louisiana Court.

Nurse Frazier then brought suit in the District Court

pursuant to 42 U.S.C. § 1983 for violations of her First and Fourteenth Amendment rights and pendent state claims for retaliatory discharge and intentional infliction of emotional, physical, and mental injuries against numerous officials in both their official and individual capacities. The District Court determined that the issue of liability for the First Amendment claim was precluded by the opinion of the Louisiana Civil Service Commission. A bench trial was held on the qualified immunity defense, the pendent state law claims and damages.[2]

The District court found that Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills were not entitled to the affirmative defense of qualified immunity, and that they were liable under Louisiana law for intentional infliction of emotional distress. The District court awarded Nurse Frazier Fifty Thousand and NO/100 ($50,000.00) Dollars for loss of her voice, Twenty Thousand and NO/100 ($20,000.00) Dollars for past and future medical expenses, Twenty Thousand and No/100 ($20,000.00) Dollars for mental anguish and suffering, Ten Thousand and NO/100 ($10,000.00) Dollars in lost wages, and Twenty Five Thousand and NO/100 (25,000.00) Dollars in punitive damages. Paul Henry Kidd, counsel for Nurse Frazier, was, following a hearing, awarded Thirty Thousand, One Hundred and Forty and NO/100 ($34,140.00) Dollars in attorney's fees.

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[2]Secretary John T. King, Undersecretary Michael Martin, Assistant Warden Robert Henderson and Investigator Edward Mills were all dismissed from Nurse Janice Frazier's suit either prior to or at trial. They were not parties to the appeal to the Fifth Circuit. They are not parties before This Court.

Assistant Secretary Davoli, Warden Guillory and Medical Supervisor Mills took an appeal of the judgment on Nurse Frazier's suit and the award of attorney's fees to the Fifth Circuit.[3]

The Fifth Circuit overturned the District Court's application of preclusion on the First Amendment claim and found on appeal that Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills violated Nurse Frazier's First Amendment rights. The Fifth Circuit denied the Eleventh Amendment immunity defense and otherwise affirmed the judgment of the District Court.[4]

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's denial of the Eleventh Amendment immunity defense and exercising jursidiction under 42 U.S.C. § 1983 conflicts directly and in principle with prior rulings of This Court and presents important and unresolved questions.

The Fifth Circuit's denial of the Eleventh Amendment immunity defense and exercising jursidiction under 42 U.S.C. § 1983 conflicts directly and in principle with prior rulings of This Court and presents important and

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[3]Paul Henry Kidd cross-appealed on the issue of the amount of attorney's fees awarded. The cross-appeal was presumably denied because the Fifth Circuit affirmed the judgment of the District Court on the amount of attorney's fees awarded.

[4]Secretary John T. King, Undersecretary Michael Martin, Investigator Edward Mills, and Assistant Warden Robert Henderson were dismissed by the District Court. No appeal was taken to the Fifth Circuit in regards to their dismissal. They are not parties before This Court.

unresolved questions. The Fifth Circuit's exercise of jurisdiction under § 1983 conflicts directly with This Court holding in *Will v. Michigan Department of State Police*, _____, U.S. _____, 109 S.Ct. 2304 (1989). The Fifth Circuit's denial of Eleventh Amendment immunity through the use of an automatic outcome determinative stripping doctrine is a misapplication of *Ex Parte Young*, 209 U.S. 123 (1909), conflicts directly with *Lawson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and in principle with This Court's reasoning in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). The judicially created pleading device of individual capacity appears to be beyond the scope of § 1983. While § 1983 and the Eleventh Amendment are not coextensive, the pleading devices of official and individual capacity have caused them to become intertwined.

It is clear that when a State or government entity that is an arm of the State is named as a defendant under 42 U.S.C. § 1983, that the suit is barred by the Eleventh Amendment unless the State has waived its immunity. *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468,107 S. Ct., 2941, 2945-2946 (1987) (plurarity opinion). Nor are States or governmental entities that are an arm of the State persons within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Department of State Police, Supra*, 109 S.Ct. at 2311-2312 (1989). When the suit is brought against a state official in his or her official capacity for injunctive relief, however, the state official is a person within the meaning of § 1983 and the suit is not barred by the Eleventh Amendment. *Id.* 109 S. Ct. 2311 n. 10. When the suit is brought against a State official in his or her official capacity for retroactive

active money damages, the State official is not a person within the meaning of § 1983 and the suit is barred by the Eleventh Amendment. *Id.* 109 S.Ct. 2311-2312. This is now clearly the law of the land; however, when it is plead that the suit is brought against a state official in his or her individual capacity, there are no clearly defined principles of law to follow. See: *Scheuer v. Rhodes*, 416 S. Ct. 232 (1974).

In the instant case Assistant Secretary Davoli, Warden Guillory and Medical Supervisor Mills were operating solely as officials of the Louisiana Department of Corrections in regards to terminating Nurse Frazier's employment, except that such actions violated the First Amendment. In fact, the Louisiana Civil Service Commission determined that the Louisiana Department of Corrections, rather than her officials, violated Nurse Frazier's First Amendment rights. Assistant Secretary Davoli conducted an investigation at the direction of Secretary John T. King, wrote an employee disciplinary report, and signed the final termination notice. Warden Guillory held the first level internal departmental hearing. Medical Supervisor Mills merely provided information on Nurse Frazier, an employee she supervised, to her employer. Nurse Frazier merely plead and did not prove that Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills were not acting in their capacities as officials of the Louisiana Department of Corrections, which is an arm of the State of Louisiana, in regards to her termination. The Fifth Circuit merely determined that because they were sued in their individual and official capacities by Nurse Frazier and were found to have violated her constitutional rights that Assistant

Secretary Davoli, Warden Guillory, and Medical Supervisor Mills were, therefore, automatically stripped of their official or representative character. *Frazier v. King*, 873 F2d 820, 827 rehearing denied 878 F2d 1435 (5th Cir., 1989). Using this rationale, the result is: if the state official wins, he or she is operating in his or her official capacity; if the plaintiff wins, the state official is not operating in his or her official capacity. Under the first, the suit cannot proceed because of the Eleventh Amendment and the fact that the state official is not a person under § 1983. Under the second, the suit can proceed and money damages can be awarded because the state official is operating in his or her individual capacity. This determination, however, cannot be made until the trial on the merits is over.

This Court in *Will*, appears to have disregarded the approach taken by the Fifth Circuit, in regards to § 1983. In that case, like the instant case, a state civil service commission determined that violations of the First Amendment occurred. In *Will*, This Court determined that Michigan's Director of State Police was, nevertheless, acting in his official capacity and was, therefore, not a person under § 1983. *Id.* 109 S. Ct. at 2305-2312.

Both *Will* and the instant case involve official State actions relating to the employment function of a State. *Will* involved a promotion. *Id.* 109 S.Ct. at 2306. The instant case involves firing. *Frazier v. King*, Supra at 823. Otherwise there is no distinction between these two cases in regards to § 1983 except that Will's suit came to This Court from a State court and the instant case arose in federal court. *Will v. Michigan Department of State Police*,

Supra 109 S.Ct. at 2305, and *Frazier v. King*, Supra 821-822. Because of this distinction, however, the instant suit invokes the Eleventh Amendment immunity defense and *Will* did not. *Id.*

The Fifth Circuit in the instant case determined that because Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills, while performing their official duties committed an unconstitutional act, they acted outside their authority and are stripped of their official or representative capacities; therefore, Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills cannot be given immunity under the Eleventh Amendment. The Fifth Circuit cited only *Ex Parte Young*, Supra 209 U.S. at 159-160 (1909) and *Pennhurst State School and Hospital v. Halderman*, Supra 465 U.S. 89, 104 (1984) to support this conclusion. The Fifth Circuit stated that:

> "Because Frazier sued the defendants in their official and individual capacities for violations of her constitutional rights, her claim falls within *Ex Parte Young* and she can maintain an action against the defendants in their individual capacities under 42 U.S.C. § 1983 *Frazier v. King*, Supra at 827.

Because a State official performs his or her official duty in an unconstitutional manner does not, however, strip the state official of his or her official or representative character under § 1983. *Will v. Michigan Department of State Police*, Supra 109 S.Ct. at 2311-2312. Nor should it automatically have that effect for purposes of the Eleventh Amendment. See: *Pennhurst State School and Hospital v. Halderman*, Supra 465 U.S. at 112-117, *Law-*

son v. Domestic & Foreign Commerce Corp., 337 U. S. at 685. Nor should the fact that Nurse Frazier used the pleading device of individual capacity have been used by the Fifth Circuit to circumvent the constitutionally mandated jurisdictional limitation imposed by the Eleventh Amendment. If the pleading device of naming a state official in his or her individual capacity cannot be used to circumvent congressional intent, it should not be used to bypass a constitutionally imposed restriction. See: *Will v. Michigan Department of State Police*, Supra 109 S. Ct. at 2311. In order to strip a state official of his or her official capacity and proceed against the state official in federal court in his or her individual capacity, more must be proven than that the state official performed his or her official duties in an unconstitutional manner. What needs to be proven, however, in order to strip a state official of his or her representative or official character, has never been determined by This Court. The instant suit puts this question squarely before This Court.

Since Section 1 of the Fourteenth Amendment by its clear wording only prohibits States from abridging privileges or immunities of citizens, Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills also question whether they can be sued in their individual capacity under § 1983. 42 U.S.C. § 1983 was passed by Congress under the authority granted to it by Section 5 of the Fourteenth Amendment. *Id.* 109 S.Ct. at 2309. Section 5 of the Fourteenth Amendment grants to Congress only the authority to pass laws to enforce the provisions of that Amendment. Neither Section 1 of the Fourteenth Amendment nor the First Amendment prohibits individuals from doing anything. Section 1 of the

Fourteenth Amendment prohibits a State. The First Amendment prohibits Congress. Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills question the validity of the judicially created pleading devices of individual capacity under § 1983 to deprive them of their official or representative capacity for the sole purpose of circumventing congressional intent under § 1983 and bypassing the Eleventh Amendment in order to subject them to retroactive money damages in Federal Court under § 1983. See: Cf. *Scheuer v. Rhodes*, Supra 416 U.S. at 233-250 (1974)

The Fifth Circuit's denial of the Eleventh Amendment immunity defense and exercising jurisdiction under 42 U.S.C. § 1983 conflicts directly and in principle with prior rulings of This Court and presents important and unresolved questions. The Fifth Circuit's exercise of jurisdiction under § 1983 conflicts directly with This Court's holding in *Will v. Michigan Department of State Police*, Supra 109 S.Ct. at 2312. The Fifth Circuit's denial of Eleventh Amendment immunity through the use of an automatic outcome determinative stripping doctrine using *Ex Parte Young*, Supra, conflicts directly with *Lawson v. Domestic & Foreign Commerce Corp.*, Supra 337 U.S. at 685, and in principle with This Court's reasoning in *Pennhurst State School and Hospital v. Halderman*, Supra, 465 U.S. at 112-117, Cf. *Cory v. White*, 437 U.S. 85, 91 (1982). The judicially created pleading device of individual capacity appears to be beyond the authority delegated to Congress under Section 5 of the Fourteenth Amendment. The meaning of person within § 1983 and the extent of the Eleventh Amendment are not coextensive. *Will v. Michigan Department of State Police*, Supra 109

S. Ct. at 2309. They are, nevertheless, clearly intertwined. One is closely and often related to the other, because of the judicially created pleading device of individual capacity under § 1983. This Court needs to determine the law of the land in these areas. Plenary consideration of the matter by This Court is essential.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Petitioner reiterates that Questions 2, 3, 4 and 5 are presented herein, not as reasons for granting certiorari, but because in the posture of this case these issues must now be raised before This Court. This suit should be dismissed because Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills were acting in their official capacities. They are, therefore, not persons under § 1983 and are entitled to the Eleventh Amendment immunity against retroactive money damages. They cannot be sued in their individual capacity. The ruling of the Fifth Circuit on jurisdiction should be reversed and this suit should be dismissed both on the grounds that Assistant Secretary Davoli, Warden Guillory, and Medical Supervisor Mills are not persons under § 1983 and that the Eleventh Amendment bars a suit against them for retroactive money damages.

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APPENDIX

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 87-4903
No. 88-4164

JANICE FRAZIER,
Plaintiff-Appellee
Cross-Appellant,

v.

JOHN T. KING, ETC., ET AL.,
Defendants,

CHARLES DAVOLI, LINDA MILLS AND DONALD GUILLORY,
Defendants-Appellants
Cross-Appellees.

JANICE FRAZIER,
Plaintiff,

PAUL HENRY KIDD,
Plaintiff-Appellee,

v.

JOHN T. KING, ETC., ET AL.,
Defendants,

CHARLES DAVOLI, LINDA MILLS AND DONALD GUILLORY,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 05-30-89, 5 Cir., 198__ , _____ F.2d _____)
(June 29, 1989)

Before THORNBERRY, KING and JONES, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Carolyn Dineen King
United States Circuit Judge

APPENDIX B

JANICE FRAZIER,
Plaintiff-Appellee
Cross-Appellant,

v.

JOHN T. KING, ETC., ET AL.,
Defendants,

CHARLES DAVOLI, LINDA MILLS AND
DONALD GUILLORY,
Defendants-Appellants
Cross-Appellees.

JANICE FRAZIER,
Plaintiff,

PAUL HENRY KIDD,
Plaintiff-Appellee,

v.

JOHN T. KING, ETC., ET AL.,
Defendants,

CHARLES DAVOLI, LINDA MILLS AND
DONALD GUILLORY,
Defendants-Appellants.

Nos. 87-4903, 88-4164.

United States Court of Appeals,
Fifth Circuit.

May 30, 1989.

Rehearing and Rehearing En Banc
Denied June 29, 1989.

Registered nurse at state correctional center infirmary brought suit against numerous state officials under federal civil rights statute for violations of her rights un-

der First and Fourteenth Amendments and under state law for claims of retaliatory discharge and infliction of emotional, physical, and mental injuries. The United States District Court for the Western District of Louisiana at Shreveport, Tom Stagg, Chief Judge, entered judgment from which defendants appealed. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) prior adjudication of Louisiana Civil Service Commission that firing violated nurse's rights and that nurse was entitled to reinstatement with back pay did not preclude her federal civil rights claim, under either federal or state rules of claim preclusion; (2) nurse's First Amendment rights were violated by her firing for reporting violations and nursing practices; and (3) state officials were not shielded by Eleventh Amendment grant of sovereign immunity or by qualified immunity.

Affirmed.

Edith H. Jones, Circuit Judge, dissented in part and filed opinion.

1. Administrative Law and Procedure 501
Civil Rights 61

Discharged registered nurse at state correctional center was not barred from bringing federal civil rights suit seeking lost wages, compensatory and punitive damages, and attorney's fees following Louisiana Civil Service Commission determination that she was entitled to reinstatement with back pay, under federal law or Louisiana principles of res judicata; nurse had not engaged in artful pleading to create illusion that "things demanded" in her actions differed, as limitations on Commission's

power prohibited her from seeking complete damages in that administrative proceeding. LSA-R.S. 13:4231; 42 U.S.C.A. § 1983.

2. Constitutional Law 90.1(7.2)

First Amendment rights of registered nurse at state correctional center infirmary were violated by her discharge after she reported violations of nursing practices; nurse's speech involved matter of public concern, disruption from nurse's "whistle-blowing" was minimal interest when weighed against exposure of unethical medical practices affecting hundreds of inmates, and warden's warning that nurse would lose her job if she filed complaint with State Board of Nursing was sufficient evidence that her speech motivated decision to fire her. U.S.C.A. Const.Amend. 1.

3. Federal Courts 269

Eleventh Amendment did not bar federal civil rights claim by registered nurse at Louisiana correctional center infirmary against various state officials in their official and individual capacities, alleging First and Fourteenth Amendment rights in connection with her discharge for reporting violations of nursing practices. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 1, 11, 14.

4. Civil Rights 13.8(2)

Louisiana state officials were not entitled to qualified immunity in federal civil rights suit by registered nurse at Louisiana correctional center infirmary who was discharged for "whistle-blowing"; nurse's clearly estab-

lished First Amendment rights were violated by official's conduct. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 1.

Joseph E. Kopsa, Willliam J. Guste, Jr., Atty. Gen. Houston T. Penn, Asst. Atty. Gen., Baton Rouge, La., for appellants.

Paul Henry Kidd, Monroe, La., Rebecca L. Hudsmith, New Orleans, La., for appellees.

Appeals from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, KING and JONES, Circuit Judges.

THORNBERRY, Circuit Judge:

Frazier, plaintiff-appellee, brought suit against numerous Louisiana state officials, defendants-appellants, (1) under 42 U.S.C. § 1983 for violations of her rights under the First and Fourteenth Amendments; and (2) under state law for claims for retaliatory discharge and intentional infliction of emotional, physical and mental injuries. The district court held that (1) a previous finding by the Louisiana Civil Service Commission (LCSC) that the defendants had violated Frazier's First Amendment rights precluded relitigation of this issue; (2) the defendants were not entitled to qualified immunity; (3) Frazier was entitled to lost wages, attorney's fees, and compensatory and punitive damages for intentional infliction of emotional, physical and mental injuries; and (4) Frazier could not sustain a claim for retaliatory discharge. On appeal, the defendants urge that (1) they are entitled to Eleventh Amendment immunity and qualified immunity;

(2) the prior LCSC adjudication precludes Frazier's § 1983 claim and, alternatively, if the LCSC decision does not preclude Frazier's § 1983 claim, the defendants are not precluded from relitigating the issue of their liability; (3) they were denied due process to contest liability; (4) Frazier is not entitled to lost wages; (5) the court erred in awarding compensatory and punitive damages; and (6) the attorney's fee award was improper.

I. Facts.

In May 1981, Frazier was hired by the Wade Correctional Center (Wade) as a registered nurse working in the infirmary. Soon after she began working at Wade, Frazier reported violations of nursing practices in the infirmary to her supervisor Mills. Frazier revealed that inmates were being denied medical care, and that nurses were changing doctors' orders, completing prescription forms, and making medical diagnoses. Mills failed to address the problems Frazier brought to her attention.

Frazier then discussed the problems at the infirmary with Assistant Warden Henderson and Warden Guillory. The Warden did not investigate any of the improprieties Frazier had alleged. Henderson did attempt to investigate Frazier's claims, but the Warden threatened to have him transferred out of Wade. Apparently in response to Frazier's report to Henderson and Guillory, Mills reprimanded Frazier and threatened that Frazier might lost her job.

In the summer of 1982, Frazier spoke with Nurse Ibert, an administrator with the Department of Corrections, about the nursing practices at Wade. Frazier pro-

vided Ibert with documentation of her allegations. Ibert and another administrator then wrote two reports based on an investigation they conducted at Wade. These reports revealed that Frazier's criticisms were well-founded.

Despite Frazier's attempts to have the violations at Wade remedied, they continued to occur and Mills continued to threaten Frazier. In December 1982, Frazier again spoke with the Warden. She told him that she would report the violations to the media and the State Board of Nursing if they were not corrected. The Warden said that if Frazier went to the media or the State Board of Nursing, he would fire her.

Frazier then contacted former Secretary of the Louisiana Department of Corrections King and a nursing consultant with the Louisiana State Board of Nursing, Sister Lucie, outlining the violations at Wade. Frazier copied inmate records which she gave to Sister Lucie; Frazier obtained the inmates' consent before forwarding their records to Sister Lucie; however, Frazier later sent Sister Lucie additional records for which she did not obtain consent.

In January 1983, the State Board of Nursing charged Mills with violations of the Louisiana Nursing Practices Act. Mills entered into a consent agreement in May of 1983.

In the meantime, the Warden called Frazier into his office and accused her of making malicious, derogatory and slanderous statements. He demanded that Frazier turn over a tape recording of a conversation in which Ibert told Frazier that Mills was going to be fired because of her

professional improprieties. Frazier refused to turn over the tape. The Warden threatened to send a guard to Frazier's home to retrieve the tape. Eventually, Frazier gave the Warden the tape under the condition that Ibert would not be fired.

The Warden continuously demanded that Frazier recant her allegations and write a formal apology. Frazier refused. Throughout this period, the Warden and Mills were trying to find some grounds to fire Frazier.

In February and April 1983, a Department of Corrections administrator, Davoli, investigated the infirmary at Wade for violations of the Nursing Practices Act. At the end of the investigation, Davoli filed a disciplinary report against Frazier, charging that she had made malicious statements about Department of Corrections' personnel and about illegal practices at Wade. The report further stated that Frazier had violated Department of Corrections' rules when she copied confidential inmate records without the inmates' consent. The report ended with a recommendation that Frazier be terminated. Frazier was then fired.

Frazier appealed her termination to the LCSC, which found that the defendants' decision to fire her was a violation of Frazier's rights "to speak out about the nursing practices at Wade." The LCSC then ordered the defendants to reinstate Frazier with back pay and to expunge all references to her termination from her personnel folder.

In August 1984, Frazier brought the instant suit against the defendants alleging (1) at 42 U.S.C. § 1983 claim based on violations of her rights under the First and

Fourteenth Amendments, and (2) state law claims for retaliatory discharge and intentional infliction of physical, emotional and mental injuries.

II. Preclusion.

As discussed above, Frazier appealed her termination to the LCSC, alleging that the decision to fire her was discriminatory, retaliatory and in violation of her due process and First Amendment rights. After two days of hearings, the LCSC found that

> [t]he public interest in having free and unhindered debate on matters of public importance is the core value of the Free Speech Clause of the First Amendments of the United States and Louisiana Constitutions. Equally as important is the right of the employee to engage in such speech without the threat of retaliatory dismissal by their [sic] employer. . . .
>
> [T]he referee concludes that appellant's constitutional right to speak out about the nursing practices at Wade and to supply the nursing board with copies of inmate medical records is [not][1] significantly outweighed by the Department of Corrections' need to maintain discipline among its employees.

The LCSC then ordered the defendants to reinstate Frazier with back pay and awarded Frazier attorney's fees.

A central question in this appeal is the claim and issue preclusive effect of the LCSC decision. We must decide whether the LCSC decision precludes Frazier's §

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[1] The LCSC opinion does not include the word "not;" however, a review of the entire opinion indicates that the omission of "not" in this sentence was an error.

1983 *claim*. Then, we must determine whether the LCSC finding that the defendants violated Frazier's First Amendment rights precludes relitigation of this *issue*. We note at the outset that the district court erred in its preclusion analysis. The district court reviewed the *issue* preclusive effect of the LCSC's determination that the defendants violated Frazier's rights under rules of *claim* preclusion.

A. *Claim Preclusion.*

In reviewing the defendants' argument that the doctrine of claim preclusion prohibits Frazier from bringing this suit, two issues arise: first, whether state, federal or both state and federal claim preclusion rules apply; and second, whether Frazier is barred from bringing this claim under the relevant rules of claim preclusion.

In *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the Supreme Court held that federal common law rules of preclusion incorporate state *issue preclusion* rules in a federal suit brought after a state administrative adjudication arising from the same facts. The Supreme Court has not established which forums' rules of *claim preclusion* apply to federal suites brought after state agency adjudications. In fact, since *Elliott*, only one circuit has addressed this issue. In *Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987), the Eleventh Circuit held that federal claim preclusion rules apply when determining whether a state administrative decision precludes a subsequent § 1983 claim.

[1] We need not, at this time, decide whether state or federal rules of claim preclusion apply in this situation

because, after analyzing the claim preclusive effect of the LCSC decision under both state and federal rules, we find that neither forums' claim preclusion rules bar Frazier's § 1983 claim.

1. Federal Rules of Claim Preclusion.

In *Patsy v. Florida International University*, 634 F.2d 900, 910 (5th Cir.1981) (en banc), *rev'd on other grounds*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), we held that "[u]nlike judicial actions, state administrative proceedings carry no res judicata or collateral estoppel baggage into federal court. Resorting to appropriate and adequate state administrative remedies in no way precludes federal court protection of federal constitutional and statutory rights." Although *Elliott* has overruled the *Patsy* holding regarding issue preclusion,[2] neither this court nor the Supreme Court has held that success in an administrative proceeding precludes a § 1983 claim in federal court. In fact, the Eleventh Circuit has held that claim preclusion does not apply in this context. *See Gjellum*, 829 F.2d at 1070 (relying on *Patsy* to hold that the plaintiff was not precluded from pursuing his § 1983 claim even though he had prevailed in a prior administrative proceeding); *Healy v. Town of Pembroke Park*, 831 F.2d 989, 991-92 (11th Cir.1987) (holding that where a state commission lacked the authority to award compensatory damages, the commission's award of reinstatement with back pay did not preclude the plaintiffs from bringing a subsequent claim in federal court for

[2]State rules of issue preclusion may bar relitigation of issues in federal court that were previously litigated in state administrative proceedings.

compensatory damages under § 1983). The Sixth Circuit allowed plaintiffs to pursue § 1983 claims following administrative proceedings without even mentioning claim preclusion in *Barnes v. McDowell*, 848 F.2d 725, 732 (6th Cir.1988). Several other courts have held that unreviewed administrative decisions do not preclude subsequent claims under the Age Discrimination in Employment Act. *See Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir.1987); *Rosenfield v. Department of the Army*, 769 F.2d 237 (4th Cir.1985). *Contra Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir.1987). Similarly, the Supreme Court has held that an arbitration award does not preclude a subsequent § 1983 action. *McDonald v. City of West Branch*, 466 U.S. 284, 290-92, 104 S.Ct. 1799, 1803-04, 80 L.Ed.2d 302 (1984).

After reviewing the extensive case law on claim preclusion, we rely on the language in *Patsy* to hold that federal law does not preclude Frazier from pursuing her § 1983 claim. This holding permits plaintiffs to pursue administrative remedies without jeopardizing their § 1983 claims. This result is consistent with § 1983's purpose of protecting federal rights. In addition, it has the practical effect of encouraging plaintiffs to seek administrative remedies before turning to the federal courts. A contrary result would encourage plaintiffs to bypass administrative proceedings in order to preserve their claims under § 1983.

2. State Rules of Claim Preclusion.

The defendants must prove that the following conditions exist before the doctrine of res judicata will bar

Frazier's claim: "The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." La.Rev.Stat.Ann. § 13:4231 (West Supp.1989). In the LCSC proceeding Frazier demanded reinstatement with back pay. In the instant suit, she seeks lost wages, compensatory and punitive damages, and attorney's fees. We have previously held that plaintiffs cannot escape Louisiana rules of res judicata by pleading separate and distinct relief in different lawsuits where both suits involve the same cause of action. *Lewis v. East Feliciana Parish School Board*, 820 F.2d 143 (5th Cir.1987); *Hernandez v. City of Lafayette*, 699 F.2d 734 (5th Cir.1983). Although the logic of *Lewis* and *Hernandez* is compelling where plaintiffs seek damages in federal court that they could have sought in state court, it is not relevant where the original forum does not have the power to award the damages sought in the second action. In the instant case, the LCSC did not have the power to award Frazier all the damages she now seeks in federal court. Unlike the plaintiffs in *Lewis* and *Hernandez*, Frazier has not engaged in artful pleading to create the illusion that the "things demanded" in her two actions differ. Rather, limitations on the power of the LCSC prohibited her from seeking complete damages in the LCSC proceeding. We, thus find that Louisiana rules of res judicata do not bar Frazier from bringing the instant suit. *See Robertson v. Popeye's Famous Fried Chicken*, 524 So.2d 97 (La.App. 4th Cir.), *writ denied*, 526 So.2d 802 (1988) (holding that plaintiff's demand for workers' compensation disability benefits differed from thing demanded in subsequent tort action).

B. *Issue Preclusion.*

In *Elliott*, 478 U.S. at 799, 106 S.Ct. at 3227, the Supreme Court held that state rules of issue preclusion apply in federal actions brought after unreviewed state administrative proceedings.

Louisiana rules of issue preclusion apply to this case. A review of Louisiana law reveals that Louisiana courts have not adopted the doctrine of collateral estoppel. *B.E. Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156-57 (La.1978). Thus, under Louisiana law, the LCSC determination that the defendants violated Frazier's First Amendment rights does not have issue preclusive effect.

III. Constitution Violation.

Although the LCSC finding that the defendants violated Frazier's rights does not have issue preclusive effect, we need not remand the case for the district court to determine whether a violation did, in fact, occur. A review of the record indicates that the parties actually litigated and the district court ruled on this issue in the context of the defendants' claim of qualified immunity. The parties presented evidence and memoranda of law to the trial court and provided extensive briefing to this court on the precise elements of Frazier's claim that the defendants violated her constitutional rights. Because the parties litigated this issue and the district court ruled on it, albeit in the context of qualified immunity, we find that the issue was fully litigated and is now ripe for our review.

[2] In order to establish a constitutional violation Frazier must first prove that her speech involved a mat-

ter of public concern. *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). Second, she must demonstrate that her interest in "commenting upon matters of public concern" is greater than the defendants' interest in "promoting the efficiency of the public services [they] perform." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). Third, she must show that her speech motivated the defendants' decision to fire her. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). If Frazier is able to prove these three elements, the burden shifts to the defendants to prove that they would have fired Frazier even if she had not exercised her right to free speech. *Id.*

A. *Matter of public concern.*

The defendants concede that "[t]he quality of nursing care given to any group of people, including inmates, is a matter of public concern." We agree. *See Brawner v. City of Richardson, Texas*, 855 F.2d 187, 192 (5th Cir.1988) (holding that a police officer's letter to local paper reporting improprieties at the police department addressed a matter of public concern).

B. *Balancing Frazier's interest against the interests of the state.*

The defendants hinge their claim of qualified immunity on the fact that the state's interest in confidentiality and the smooth functioning of the infirmary is greater than Frazier's interest in speaking out about the nursing practices at Wade. The defendants urge that Frazier violated rules of confidentiality and Wade's procedures

when she gave Sister Lucie copies of inmates' records. In addition, the defendants assert that Frazier disrupted the infirmary by (1) copying inmate records when she should have been helping patients; (2) creating "an atmosphere of uncertainty among the other nurses;" and (3) failing to follow established grievance procedures.

In balancing the state's interest in confidentiality and a non-disruptive environment against Frazier's interest in reporting the nursing practices at Wade, we are guided by the Supreme Court's recent decision in *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 2898-99, 97 L.Ed.2d 315 (1987), holding that the

> statement[s] will not be considered in a vacuum; the manner, time and place of [Frazier's] expression are relevant, as is the context in which the dispute arose [citations omitted]. . . . [P]ertinent considerations [are] whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impeded the performance of the speaker's duties or interferes with the regular operations of the enterprise [citations omitted].

The *Rankin* court stated that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Id.* at 384, 107 S.Ct. at 2896.

The defendants concern about confidentiality is misguided. Their own witness testified that it would not be

a breach of confidentiality to send copies of the records to the State Board of Nursing.

The defendants do have a legitimate concern about the disruption caused by Frazier's accusations. Although Frazier's "whistle blowing" obviously created tension and difficulties at Wade, when weighed against the exposure of unethical medical practices affecting hundreds of inmates, the disruption is a minimal interest. *See Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir.1988) (holding that the greater the public concern, the greater the disruption must be to give rise to qualified immunity, relying on *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir.1985), *cert. denied* 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986)). As this court held in *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir.1979), "it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office."

C. *Motivation behind defendants' decision to terminate Frazier.*

Under *Mt. Healthy*, Frazier must demonstrate that the exercise of her First Amendment rights motivated the defendants' decision to fire her. Once she has shown such motivation, the defendants must prove that they would have fired Frazier even absent her expression.

The district court found that Frazier's speech motivated the defendants' decision to fire her. The Warden's warning that if Frazier filed a complaint with the State Board of Nursing she would lose her job is alone sufficient evidence to support this finding.

The only reason the defendants gave for terminating Frazier was that she copied some inmate records without the inmates' consent. A witness for the defendants testified that it was not a violation for Frazier to copy the inmates' records and submit the records to the State Board of Nursing without the inmates' consent. This testimony supports the district court's finding that the defendants failed to demonstrate that they would have fired Frazier even if she had not exercised her First Amendment rights.

We find that the district court was correct in holding that the defendants violated Frazier's right of free speech.

IV. Sovereign Immunity.

[3] The defendants urge that the Eleventh Amendment grant of sovereign immunity shields them from liability and deprives this court of jurisdiction. The Eleventh Amendment prohibits a citizen from bringing a suit in federal court against his own state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

In *Ex parte Young*, the Supreme Court held that a state official cannot invoke the shield of sovereign immunity if the official has acted in violation of the Constitution. 209 U.S. 123, 159, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1909). Under *Young*, when a state officer acts unconstitutionally, he is acting outside his authority and is "stripped of his official or representative character." *Id.* at 160, 28 S.Ct. at 454. *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984) (recognizing the continued validity of *Ex parte Young*).

Because Frazier sued the defendants in their official and individual capacities for violations of her constitutional rights, her claim falls within *Ex parte Young* and she can maintain an action against the defendants in their individual capacities under 42 U.S.C. § 1983. *See American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336, 1340-41 (5th Cir.1981) (holding that the Eleventh Amendment does not bar claims for damages against state officials for violations of individuals' First Amendment rights).

V. Qualified Immunity.

[4] The defendants are not entitled to qualified immunity if Frazier's First Amendment rights were " 'clearly established' at the time of [the defendants'] conduct so that a reasonable official would have understood that his conduct violated [Frazier's rights]." *Brawner*, 855 F.2d at 191.

The Supreme Court recently articulated what is meant by "a clearly established right." In *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), the Supreme Court stated that:

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [citations omitted]; but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Applying *Anderson* to the instant case, the evidence indicates that the defendants violated Frazier's clearly es-

tablished First Amendment rights. There has been extensive publicity over the past decade concerning the rights and protections afforded whistle blowers. A reasonable official would know that it would be a violation of Frazier's rights to fire her after she blew the whistle on the improprieties at the prison. *See Brawner*, 855 F.2d at 193 (stating that "a reasonably objective public official would have known that termination of an employee for his speech concerning misconduct by public officials would violate a clearly established constitutional right").

VI. Damages.

After reviewing the record and the district court's findings, we hold that the evidence fully supports the district court's award of damages and attorney's fees.

VII. Conclusion.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

EDITH H. JONES, Circuit Judge, dissenting in part:

This is a difficult and novel case as to which differences of opinion may legitimately be held. With deference, I disagree with the majority's suggestion that a federal claim preclusion rule may apply to Mrs. Frazier's § 1983 claim, and I am uncertain whether they have properly articulated Louisiana claim preclusion law. I therefore dissent in part.

The majority write that it is not necessary to "decide whether state or federal rules of claim preclusion apply in this [case] because . . . we find that neither forums' claim preclusion rules bar Frazier's § 1983 claim." I dissent from

the suggestion that federal claim preclusion applies.[1] Although the Supreme Court has not directly spoken on the claim preclusion law that governs a § 1983 suit brought after an unreviewed state agency adjudication, I believe that the majority's suggestion is fundamentally inconsistent with the trend of recent Supreme Court cases. I think it inescapable from these decisions that § 1983 should not be governed by a federal claim preclusion rule and a state issue preclusion rule.

In *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 442, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), the Supreme Court unanimously held that the findings of the federal Advisory Board of Contract Appeals were binding on the subsequent Court of Claims proceeding. The Court referred generally to principles of res judicata and did not distinguish between issue preclusion and claim preclusion. Although this was not a § 1983 case, its holding was later applied by the Court in that context.

Interpreting the federal full faith and credit statute, 28 U.S.C. § 1738, the Supreme Court held in *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) that the federal courts must apply state issue preclusion rules in § 1983 suits as long as there was a full and fair opportunity to litigate the issues actually decided in the prior state-court proceeding. The Court rejected the argument that § 1983 is a statutory exception to the full faith and credit statute. In other words, it rejected the

[1] There is no question but that federal law applies in this § 1983 action. The only question is whether the federal common law compels the adoption of an independent federal rule of preclusion or whether it compels the application of a state rule of preclusion.

argument that the federal rights at issue in § 1983 suits require a federal rule of preclusion. Notwithstanding the importance of the federal rights, there was no intent to override the full faith and credit statute.

In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81, 102 S.Ct. 1883, 1896-97, 72 L.Ed.2d 262 (1982), the Supreme Court stated that: "It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect. . . . There is no requirement that judicial review must proceed de novo if it is to be preclusive." *Accord Holmes v. Jones*, 738 F.2d 711, 713-14 (5th Cir.1984) (citing circuit precedent prior to *Kremer*). The Court also stated that administrative proceedings will be given issue preclusive effect as long as they satisfy minimal procedural requirements of the due process clause. 102 S.Ct. at 1897-98. Thus, it is settled that we must apply state rules of issue preclusion to a state court's summary review of a state administrative adjudication as long as that administrative proceeding satisfies the due process clause.

In *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the Supreme Court reasoned that "[i]f § 1983 created an exception to the general preclusive effect accorded to state-court judgments, *such an exception would seem to require similar treatment of both issue preclusion and claim preclusion.*" *Id.* 104 S.Ct. at 897 (emphasis added). The Court stated that "a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources" are more important "than to ensure separate forums for federal and

state claims." 104 S.Ct. at 898. The Court noted that the plaintiff in *Migra*, like Frazier, was "in an offensive posture in her state-court proceeding, and could have proceeded first in federal court had she wanted to litigate her federal claim in a federal forum." *Id.* at n. 7.

Finally, in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the Supreme Court stated that the full faith and credit statute "informed" their decision on a federal rule of issue preclusion regarding unreviewed state administrative findings. Relying on *Utah Construction*, the Court held "that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts." 106 S.Ct. at 3227 (citation omitted). The Court pointed out that the interests identified in *Utah Construction* and *Allen v. McCurry* were "equally implicated whether fact finding is done by a federal or state agency." The Court listed some of these interests served: avoiding the cost and vexation of repetitive litigation; the public's interest in conserving judicial resources; and federalism (noting that "the Full Faith and Credit Clause compels the States to give preclusive effect to the administrative tribunal of a sister State"). *Id.* at 3226.

If the majority are correct that a federal rule of claim preclusion governs Mrs. Frazier's successive administrative and § 1983 actions, while a state rule of issue preclusion applies as a result of *Elliott*, we have a most ungainly result. The majority suggest that applying state claim

preclusion rules could thwart the aim of §1983 to provide full compensation for violations of civil rights. We do not know this, however, without knowing applicable state claim preclusion rules. Here, for instance, the majority conclude (although they may err) that Louisiana's law would not prevent Mrs. Frazier from pursuing her § 1983 damage suit after a successful administrative proceeding. I believe the general common law of preclusion would so hold on grounds that the administrative agency lacked jurisdiction to award compensatory damages. In any event, an administrative proceeding may often prove more advantageous than a damage remedy because it authorizes equitable relief such as reinstatement and is more promptly determined. Extrapolating the Supreme Court's approach to an issue based on its previous decisions is always chancy, but here, I believe, we have more than the usual indication of a trend toward adoption of state law claim preclusion rules in § 1983 actions.

I have some additional doubts about the majority's discussion of Louisiana preclusion law. See La.Rev.Stat.Ann. art. 13:4231 (West Supp.1987). The majority hold that claim preclusion does not apply because the LCSC had no authority to grant the relief Mrs. Frazier was awarded here. That proposition may be true, but it is not established by the case they cite, *Robertson v. Popeye's Famous Fried Chicken*, 524 So.2d 97 (La.App. 4th Cir.), writ denied, 526 So.2d 802 (La.1988). *Robertson* held that Louisiana res judicata does not bar a plaintiff who recovered workmen's compensation from his employer from suing a third-party tortfeasor. All three criteria for res judicata—the parties, the causes, and the

thing demanded—were held different between the two lawsuits, and it was noted that Louisiana's workers compensation law specifically preserves a claimant's right to pursue a third-party damage action in addition to his statutory remedy. 524 So.2d 99. Here, by contrast, the district court held that Louisiana jurisprudence firmly establishes that an LCSC decision is accorded res judicata effect after the time for appeal has expired.[2] Further, in *Foreman v. Falgout*, 503 So.2d 517 (La.App. 1st Cir.1986), the state court held that the LCSC has exclusive jurisdiction over disputes involving removal and discipline of state employees, thus preempting a state tort action against his supervisors. The distinction, for res judicata purposes, between *Foreman* and this case eludes me. Consequently, I am dubious of today's ruling on Louisiana claim preclusion law.

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[2]The cases it cites, admittedly, generally deal with the Commission's exclusive jurisdiction to award equitable relief to the complaining civil servant. *See e.g., Thomas v. Dept. of Corrections*, 430 So.2d 1153, 1155 (La.App. 1st Cir.), *writ denied*, 438 So.2d 566 (La.1983); *Raborn v. La. Health & Hum. Res. Admin.*, 349 So.2d 903, 904 (La.App. 1st Cir.), *writ granted*, 351 So.2d 175 (La.1977).

APPENDIX C

In The United States District Court for the Western District of Louisiana Shreveport Division

JANICE FRAZIER
VERSUS
JOHN T. KING ET AL

Civil Action No. 84-2189
Judge Tom Stagg

JUDGMENT

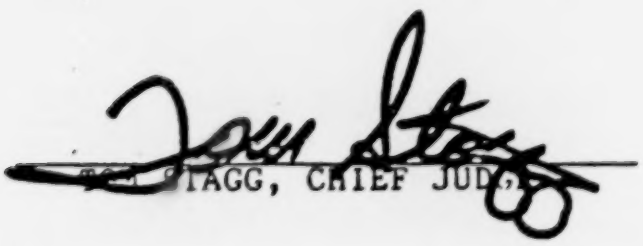
IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in plaintiff's favor on her claims pursuant to 42 U.S.C. §§ 1983 and 1988 and for her pendent state claim for intentional infliction of emotional distress.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's pendent state claim for retaliatory discharge is hereby DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that damages shall be awarded plaintiff in the sum of $50,000 for loss of voice, $20,000 for past and future medical expenses, $20,000 for mental anguish and suffering, $10,000 in lost wages, and $25,000 in punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff is also awarded attorney's fees pursuant to 42 U.S.C. § 1988. Judgment as to the amount of attorney's fees will be reserved and resolved by regular motion practice or, alternatively, joint stipulation.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 2nd day of November, 1987.



TOM STAGG, CHIEF JUDGE

APPENDIX D

In the United States District Court for the Western District of Louisiana Shreveport Division

JANICE FRAZIER
versus
JOHN T. KING ET AL

Civil Action No. 84-2189
Judge Tom Stagg

MEMORANDUM OPINION

Janice Frazier commenced this action on August 13, 1984 asserting that she was discharged from her employment in violation of her rights under the First and Fourteenth Amendments to the United States Constitution. Named as defendants in their individual and official capacities are Charles R. Davoli, former assistant secretary of Adult Services of the Louisiana Department of Corrections (hereinafter LDC), Donald R. Guillory, former warden of the Wade Correctional Center (hereinafter Wade) in Haynesville, Louisiana, and Linda Mills, medical supervisor at Wade.[1] Plaintiff's action is predi-

[1]Originally named defendants also included John T. King, former secretary of the LDC, Michael Martin, former undersecretary of the LDC, Robert Henderson, assistant warden at Wade, and Ed-

cated upon 42 U.S.C. §§ 1983, 1985 and 1988. In addition, plaintiff has asserted pendant claims for retaliatory discharge and intentional infliction of emotional, physical and mental injuries. La. Civ. Code Ann. Art. 2315.

FACTUAL FINDINGS

After a three-day nonjury trial which ended on August 26, 1987, the court makes the following findings of fact based upon the testimony and documentary evidence presented. Janice Frazier was employed on a full-time basis at Wade as a registered nurse. At the time of her discharge, she enjoyed permanent civil service status. Frazier's immediate supervisor was Linda Mills.

During November of 1981, Frazier began reporting to Mills what she believed to be violations of the nursing profession. The alleged violations included the following:

(a) Inmates were being denied medical care as punishment;

(b) Nurses were changing doctors' orders without consulting with a doctor;

(c) Nurses were not documenting on inmates' medical charts changes made by the nurses upon a doctor's order;

(d) Nurses were completing blank prescription forms;

(e) Nurses were completing blank duty status forms;

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ward Mills, an internal affairs officer with the LDC. Upon joint motion, Mr. Henderson was dismissed on March 20, 1986. Mr. King and Mr. Mills were dismissed pursuant to Fed. R. Civ. P. 41(b) at the close of plaintiff's case. Mr. Martin was subsequently dismissed upon joint motion.

(f) Doctors were signing blank prescription and duty status forms for nurses to fill in;

(g) Nurses were making medical diagnoses; and

(h) Nurses were withholding or substituting medications without consulting doctors.

Frazier's efforts to have these problems addressed by Mills were unsuccessful. Plaintiff then took her complaints to Assistant Warden Henderson and then to Warden Guillory. Though Henderson found Frazier's allegations to have factual merit, his efforts to conduct an investigation were terminated by the warden. As a result of her actions, plaintiff was reprimanded several times by Mills between January and July of 1982 for not following the chain of command and appropriate grievance procedures. Mills threatened to fire plaintiff if she did not do as she was told. Mills also advised Frazier that there were ways to get rid of people like her.[2] During July of 1982, Frazier sought the assistance of Valerie Ibert, assistant administrator for Adult Health Care at the LDC. At Ibert's request, plaintiff furnished various documents in-

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[2]On July 2, 1982, Mills advised Guillory in a memorandum that Frazier had been verbally reprimanded for not following the chain of command. Mills also indicated in the memo that on July 1, 1982, Dr. Jan Kohout reported that her nurses had come to him complaining about Mills tearing up prescriptions and refusing to let inmates go to the Medical Center at Louisiana State University. This memorandum is relevant for two purposes. First, it demonstrates that Mills and, in all probability, the warden were aware that allegations had been made concerning nursing violations. Second, the memo reveals that the departmental rule requiring an employee to follow the chain of command was not rigidly enforced since Mills should have directed the matter to Assistant Warden Henderson and not Guillory. Henderson was the administrative supervisor over the Medical Department.

cluding inmate's medical records to support the allegations. Ibert advised Frazier to keep the matter in strict confidence not discussing her actions with Mills or Guillory.

Ibert and Dr. Vance Cyars, a medical consultant with the LDC, visited Wade on three separate occasions between July 15, 1982 and September 16, 1982. Their findings were compiled in two reports directed to Zed S. VanBuren, director of Adult Medical Services. The first report indicates that Mills was instructed that nurses were to administer only medication that had been ordered by the physician and were not to substitute or omit medication without prior approval of the physician. Mills was also advised that the practice of dispensing medication to inmates for self-administration is strictly against departmental regulations and must cease. A second report from Byars and Ibert, dated October 7, 1982, further reveals that Frazier's allegations were well-founded. Specifically, the report provides evidence that doctors' prescriptions had been changed by nurses.[3] Also discov-

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[3]Excerpts from the report are as follows:

Dr. Cochran ordered Percodan for Jerry Stroble on 6/9/81. According to the medication sheet, it was discontinued by Ms. Mills on 6/10/81—there is no record that the physician discontinued this order. A note in the nurse's report book on 6/11/81 stated: 'Jerry Stroble—no more Percodan—all he needs to know is that it has been discontinued by the doctor per Ms. Mills.'

Jessie Foster had extractions on 5/20/81 and Percodan was ordered for pain. On 5/23/81, he was given Tylenol No. 3—no order for Tylenol No. 3 was found in his chart. Dr. Cochran's note dated 5/25/81 reads: 'Patient presented with weekend history of violent illness after codeine medication and had to be transported to LSU for treatment.' He then ordered Percodan "No.

ered was an order for treatment and duty status on which Mills had forged a doctor's signature. The report revealed that entries in patients' charts and nurses' report books, all signed by Mills, stated that certain inmates would be "written up" if they returned to the infirmary. Also found was a memo by Mills posted on the nurses' bulletin board stating that inmates reporting to the infirmary with complaints that are not emergencies would be written up, and if the nurses did not write the inmate up, the nurse would be written up. The report from Byars and Ibert to VanBuren emphatically stated that these practices should be discontinued immediately.

In September of 1982, the warden held a staff meeting of nurses and warned that what goes on at Wade is "no one else's business". Guillory further advised the nurses that if they did not like the new work schedule they could quit. Under the new work schedule, Frazier was moved to the shift beginning at 10:00 P.M. and ending at 6:00 A.M. A registered nurse normally did not work on this shift. The warden's meeting with the nurses was the first of its kind.

In the early part of December, 1982, plaintiff met once again with the warden and told him that she could

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12". . . . On 5/27/81, an unsigned order for Darvocet-N-100. One every four hours P.R.N (No. 12 only) was written. There was no order by Dr. Cochran to change this medication, but a note in the nurse's report book dated 5/27/81, stated: 'Jessie Foster—Percodan changed to Darvocet-N-100 every four hours P.R.N. No. 12.' This statement was not signed.

Dr. Byars' testimony at trial also confirmed the propriety of Frazier's complaints.

no longer take Mills' threats and harassment. Frazier advised the warden that she would report the violations to the media and State Nursing Board if not corrected. Guillory warned Frazier that if she went either to the press or to the Nursing Board she would be fired. Convinced that the illegal nursing practices would not be remedied within Wade, plaintiff drafted a letter to John King, former secretary of the LDC.

In the letter, which was written in December and sent sometime in January, Frazier outlined the violations and her efforts to have them corrected. Frazier also explained to King that she feared for her job due to Mills' threats. Mills had been making inquiries among the security staff as to whether plaintiff had ever done any favors for inmates upon which a disciplinary report could be based. This letter along with another sent to King reveals that Frazier's main concern was having someone address the alleged nursing violations at Wade. Frazier's year-long attempt to have the matter resolved within the institution had thus far been futile.

In December of 1982, Frazier also contacted Sister Lucie Leonard (hereinafter "Sister Lucie"), a nursing consultant for the Louisiana State Board of Nursing. At that time plaintiff furnished Sister Lucie with documentation including inmates' medical records to support her allegations. Plaintiff had not obtained consent forms from all of the inmates to release these records. In January of 1983, plaintiff, Sister Lucie, Ibert and another nurse from Wade, Bonita Nolan, met in Ruston, Louisiana to discuss the nursing practices of the Medical Department at Wade. The Nursing Board conducted an investigation into the

matter and filed a formal complaint on February 14, 1983, charging Linda Mills with violations of the Louisiana Nursing Practices Act. La. Rev. Stat. Ann. §§ 37:911-30. The complaint enumerated eleven incidents from February 23, 1981 until January 26, 1983 involving Mills' professional activities at Wade. The Nursing Board's complaint against Mills was resolved by a consent order entered into on May 12, 1983. The consent agreement incorporated eight orders which Mills and the other nurses at Wade would be required to follow.[4]

On February 18, 1983, Warden Guillory summoned plaintiff into his office and accused her of making mali-

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[4]Among the orders, which bear strong resemblance to Frazier's allegations, are:

> a. Any standing orders to be executed by a registered nurse employed at [Wade] and issued by a physician or dentist employed at [Wade] governing the nursing staff shall: (1) be signed by the physician or dentist issuing such standing orders; (2) be stated in terms of the assessments and findings appropriate to a nursing assessment and not in terms of medical diagnosis so that a nurse acting under such standing orders is not required to render a medical diagnosis; and (3) specifically and precisely prescribe, by brand name and/or generic description, strength, dosage, number, frequency and time of administration, the medications which a nurse shall administer, and/or define the actions the nurse shall take upon specified nursing assessments and findings.
>
> b. Mrs. Mills shall implement a system for maintenance of full, complete, accurate and current records of controlled substances received from the [Wade] infirmary pharmacy for administration to patients by the nursing staff. . . .
>
> c. The nursing staff at the [Wade] infirmary shall be instructed in and directed to observe proper medical records documentation. . . .
>
> d. No medication shall be administered to a patient by a nurse

cious, derogatory and slanderous statements about him in the letters that were sent to Mr. King. The warden demanded an apology. Plaintiff responded by reiterating her allegations of nursing violations. In an effort to convince Guillory that her allegations were true, Frazier advised him that she had a taped conversation between herself and Ibert wherein Ibert indicated that Mills was going to be fired because of professional improprieties. The warden demanded that plaintiff produce the tape.

When Frazier indicated that the tape was at her house, she was ordered to go home and retrieve it. Plaintiff declined to leave Wade at that time as she was the only nurse on her post. During this visit, the warden made it clear to plaintiff that she would be fired and sued for slander if she did not retract the statements in the letter to King. Guillory called plaintiff at home on at least two oc-

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at the [Wade] infirmary except pursuant to (1) the written order of a physician or dentist; or (2) the telephone order of a physician or dentist. . . .

e. In any instance in which a nurse deems it necessary for any reason to defer or alter the execution of any order of a physician or dentist, such nurse shall obtain the physician's or dentist's approval in concurrence prior to taking such action, if possible, or advise the physician or dentist as soon as reasonably possible thereafter. . . .

f. A nurse at the [Wade] infirmary shall not modify a restricted duty status established by a physician or a dentist with respect to an inmate-patient. . . .

g. A nurse at the [Wade] infirmary shall not deny an inmate examination or treatment nor discourage an inmate from seeking examination or treatment by threat of disciplinary action unless or until such inmate has regularly or repeatedly appeared for examination or treatment without legitimate cause as determined by a physician or dentist.

casions requesting the tape. The warden told plaintiff that he would send a guard to retrieve the tape if plaintiff refused. Frazier ultimately delivered the tape to the warden upon the condition that Ibert's job would not be placed in jeopardy.

A week after giving a copy of the tape to Warden Guillory, plaintiff was summoned once again. The warden renewed his demand that Frazier recant her allegations and write him a formal apology. When plaintiff declined and stated that she had nothing to apologize for, the warden advised her that she would have to suffer the consequences. During this time period, the warden joined in Mills' efforts to find some basis upon which Frazier could be terminated. The pressure and criticisms placed upon plaintiff heightened significantly.

During February and April of 1983, Charles Davoli visited Wade for the stated purpose of investigating alleged violations of the Nursing Practices Act. Two days prior to the first visit which was on February 16, 1983, Davoli was given a copy of plaintiff's letters to Mr. King. Davoli had also been provided by Ibert copies of the reports that had been written by Ibert and Dr. Byars.[5] Davoli's first official contact with plaintiff was on April 26, 1983. On this date, Davoli conducted a meeting at which the warden, Mills and plaintiff were present. In this atmosphere, permeated with hostility, Davoli invited plaintiff to voice her complaints. In light of the threats that had been made by the warden and Mills and her instructions from Ibert to keep the matter confidential, plaintiff opted for silence.

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[5]*See, supra* at footnote 3 and accompanying text.

Davoli also met with Assistant Warden Henderson. Henderson testified that Davoli's inquiry seemed to focus on Frazier rather than the medical problems at Wade. In fact, Davoli warned Henderson in frank terms that he would be "gone" within thirty days if he did not "straighten up." Henderson understood he was to keep quiet about the problems in the medical department at Wade.[6] Henderson also testified that Mills admitted to Davoli in his presence that she had been ignoring doctors' orders and changing medication. This is consistent with Davoli's testimony that he never questioned that plaintiff's allegations were well-founded. According to Davoli, his principal concern was seeing an end to the entire matter at Wade.

Apparently, Davoli felt that the most decisive and efficient way to achieve this end would be to discharge Frazier. On May 10, 1983, Davoli filed a disciplinary report charging plaintiff, insofar as pertinent, as follows:

> Ms. Frazier had made reoccurring false, misleading and malicious statements about fellow-workers and department officials and about illegal and improper practices in the administration and management of the Wade Correctional Center and the Department of Corrections and has made allegations of the subsequent cover-up by Department

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[6]Henderson had found plaintiff's allegations to be factually accurate. As a result, Henderson admonished Mills for her failure to carry out her responsibilities properly and emphasized her duties to her. When Henderson reported his belief about improprieties in the medical department to Warden Guillory, including concern that Mills was not following doctors' orders and had deliberately manipulated the duty status process, he was instructed in no uncertain terms to cease his investigation.

of Correction officials and of failure by Department of Corrections officials to properly investigate said practices; . . .

Ms. Frazier failed to abide and follow proper practices and procedures as set forth in departmental Regulation No. 10-11 . . . to wit: by her own admission in the course of the investigation on/or about April 26, 1983, and has indicated in other documents of supporting evidence, she did copy without proper authorization and adherence to regulation numerous inmate confidential records in direct violation of Department of Corrections and Wade Correctional Center policy.

The disciplinary report recommended termination. Guillory subsequently acted upon Davoli's report and also recommended that plaintiff be terminated. An administrative review hearing was conducted on July 29, 1983 whereupon the recommendations were upheld. In a letter from Davoli to plaintiff, dated August 10, 1983, plaintiff was formally advised that her termination would be effective on August 19, 1983. Davoli's letter addressed only plaintiff's violations of departmental policy relating to the sending of records to the Nursing Board without obtaining consent forms from the inmates or authorization from the appropriate authority at Wade.

Subsequently, plaintiff filed an appeal with the Louisiana Civil Service Commission. Following a public hearing at which testimony was taken and documentary evidence introduced, plaintiff was ordered to be reinstated to her position effective August 19, 1983. Plaintiff was also awarded back pay, $500 in attorney's fees, and it was ordered that all references to the termination be expunged from plaintiff's personnel folder. The Civil Service Com-

mission based its decision on a conclusion that plaintiff's First Amendment rights had been violated and that the actions taken by officials with the LDC were "blatantly unreasonable."

ANALYSIS OF LAW AND FACTS

By a memorandum ruling on August 24, 1987, the court held that the conclusion of the Louisiana Civil Service Commission would be given preclusive effect with respect to plaintiff's cause of action under 42 U.S.C. § 1983 under the authority of *University of Tennessee v. Elliott*, _____ U.S. _____ , 106 S. Ct. 3220 (1986). The Civil Service Commission concluded that plaintiff's First Amendment rights to free speech had been violated.[7]

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[7] The pertinent portions of the Civil Service Commission's opinion provide:

> Appellant [plaintiff] is charged, by the Department of Corrections with releasing confidential inmate medical records to the Louisiana Board of Nursing. The real, unwritten charge however, is that appellant breached her duty of loyalty to support her superiors and maintain silence regarding internal agency affairs.
>
> The referee further concludes that appellant was legally, morally and ethically obligated to pursue the course of action that she did. Appellant tried unsuccessfully to bring about changes in nursing practices at Wade by first going through the chain of command at Wade. The Nursing Practices Act provides that not only a registered nurse be disciplined for nursing practices that adversely affect the physical and psycho-social welfare of a patient; but, can also be disciplined for failure to report such practices. Under these circumstances, the appellant's duty to report such violations to her licensing authority and to submit documentation in support thereof far outweighed her obligation to follow the Department of Corrections rules and regulations.
>
> The public interest in having free and unhindered debate on

Since plaintiff was relieved from proving a cause of action under § 1983 by virtue of the court's ruling,[8] the sole issue at trial with regard to this claim was whether defendants should be entitled to the defense of qualified immunity.[9]

Qualified immunity is an affirmative defense. *Den-*

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matters of public importance is the core value of the free speech clause of the First Amendments of the United States and Louisiana Constitutions. Equally as important is the right of the employee to engage in such speech without the threat of retaliatory dismissal by their employer. The rights of inmates to adequate medical care has been, for at least the last decade, a central issue in the courts, and needless to say is of paramount concern to the public at large.

For the foregoing reasons, the referee concludes that appellant's constitutional right to speak out about the nursing practices at Wade and to supply the Nursing Board with copies of inmate medical records is significantly outweighed by the Department of Corrections' need to maintain discipline among its employees. The public interest is best served by appellant's actions and not those of the Department of Corrections. Additionally, appellant's actions promoted the efficiency of the service rendered.

The Department of Corrections' actions herein were blatantly unreasonable.

[8] Even absent the ruling under *University of Tennessee v. Elliot*, the findings of fact delineated above, based upon evidence adduced at trial, make it abundantly clear that defendants while acting under the color of state law violated plaintiff's rights guaranteed by the First Amendment to the United States Constitution. This will become more evident in the analysis concerning defendants' claim of qualified immunity.

[9] Plaintiff incorrectly argues that the determination by the Civil Service Commission that the actions by Department of Corrections officials were "blatantly unreasonable" precludes assertion of the qualified immunity defense. As will be discussed *infra*, the appropriate inquiry is whether defendants violated clearly established law of which reasonable person would know. This issue was not before the Civil Service Commission.

nis v. Sparks, 449 U.S. 24, 29 (1980). Thus, the initial burden is upon defendant to plead the defense and establish that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987); *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982). Specifically, the plaintiff must establish that, at the time the defendant official acted, he violated clearly settled law of which a reasonable person would know. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The inquiry is purely objective rendering the official's subjective state of mind irrelevant. *Davis v. Scherer*, 468 U.S. 183, 191 (1984); *See also Anderson v. Creighton*, _____ U.S. _____ , 107 S. Ct. 3034, 3040 (1987).

The Supreme Court in *Anderson v. Creighton*, *supra*, elaborated on the definition of "clearly established":

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent.

107 S. Ct. at 3039 (citations omitted).

Plaintiff's substantive First Amendment claim is that she was discharged and retaliated against because she had engaged in constitutionally protected expressive activity. "For at least [twenty] years, it has been settled that a state cannot condition public employment on a basis that infringes the employees' constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (citations omitted); *see also*, *Reeves v.*

Claiborne Board of Education, No. 86-4238 (5th Cir. Oct. 5, 1987) ("[I]t is 'clearly established' that a government employer cannot retaliate against an employee for the exercise of First Amendment rights.")

The governing rule was set forth by the Supreme Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, the initial inquiry is whether the statements made or activities engaged in by the public employee are directed to matters of public concern or are otherwise protected by the First Amendment. If so, the question becomes how the employee's interest in engaging in such activities is balanced against various legitimate interests the governmental employer may have. If a balance is found in favor of the employee, the second part of the *Mt. Healthy* analysis requires a factual determination which consists of two elements: (1) whether the employee's constitutionally protected speech or activity was a "motivating factor" in the employer's adverse decision; and, if so, (2) whether the employer has demonstrated that it would have made the same decision even in the absence of the protected activity. *Mt. Healthy*, 429 U.S. at 287; *see also*, *Reeves*, slip at 30. Application of the *Mt. Healthy* analysis to the facts presented by this case reveal that defendant's claim of qualified immunity must fail.

Frazier's activities and statements pertained to improprieties in nursing practices with regard to medical treatment being provided to several hundred prison inmates. Her claims were determined to be accurate and factually supported by Assistant Warden Henderson, Dr. Byars, Valerie Ibert, the State Nursing Board and the

Louisiana Civil Service Commission. Without hesitation this court now joins the list. Defendants, for reasons unknown, have never expressly addressed the inquiry under *Mt. Healthy*. Yet, testimony and documentary evidence presented at trial reveal that plaintiff's actions caused considerable friction at Wade among the employees. Thus, it may be stated that the state had a legitimate interest in providing a friendly and congenial work environment.

The court, however, finds this interest to be grossly inadequate when balanced against the need for a free flow of information to the appropriate governmental agency regarding medical care to inmates. *See, Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979) ("[I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office").

Indeed, Dr. Byars, a medical consultant for the LDC and witness for the defense, testified that when the health and welfare of inmates are rated against laws regarding confidentiality, the former are of prime concern with the latter rendered meaningless. Moreover, Dr. Byars did not believe a breach of confidentiality occurred by sending inmates' records to the nursing board.

Under the second prong of the *Mt. Healthy* analysis, the evidence establishes that Frazier's communications to Ibert, Mr. King and the Nursing Board regarding violations of the Nursing Practices Act were certainly a "motivating factor" in the decision to terminate plaintiff's employment. Mills had threatened plaintiff with her

job on several occasions if she persisted in making complaints. Plaintiff was expressly warned by the warden that she would lose her job if she filed a complaint with the Nursing Board. Assistant Warden Henderson testified that Davoli's visits to Wade were concerned more with plaintiff than the allegations of improprieties in the medical department. This is consistent with Davoli's testimony that he never doubted the foundation of plaintiff's complaints but simply desired to close the matter at Wade. The combined efforts of Davoli, Warden Guillory and Mills were designed to chill and terminate attempts by plaintiff and, to a large degree, Assistant Warden Henderson to investigate and remedy illegal practices in the medical department.

The court further concludes that defendants have not demonstrated that they would have made the same decision even in the absence of the protected activity. Violations of departmental regulations regarding the release of medical records by authorized employees were the stated reasons for plaintiff's discharge. Plaintiff's activities followed by threats of discharge from Mills and Guillory, discussed above, reveal the true basis of defendants' decision. Thus, had plaintiff succumbed to the threats and ceased her efforts to remedy the improprieties within the medical department, she would not have been dismissed. Accordingly, the court holds that plaintiff is entitled to relief under 42 U.S.C. § 1983 and that the defense of qualified immunity must fail.[10]

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[10] For cases in accord, *see Rookard v. Health & Hospitals Corp.*, 710 F.2d 41, 46-47 (2d Cir. 1983) (cause of action for First Amendment violation existed under 42 U.S.C. § 1983 where director of

PENDANT STATE CLAIMS

Plaintiff has alleged a cause of action under La. Civ. Code Ann. Art. 2315 for intentional infliction of mental suffering in addition to a claim for retaliatory discharge. With regard to plaintiff's claim under Article 2315:

> The general rule of law concerning damages for mental distress due to intentional torts requires that the plaintiff prove that the defendant either actively desired to bring about the mental anguish or realized to a virtual certainty that it would occur. Recovery for mental anguish caused by intentional torts has generally been limited to instances of outrageous conduct.

Muslow v. A. G. Edwards and Sons, Inc., 509 So.2d 1012, 1019 (La. App. 2d Cir. 1987) (citations omitted).

The repeated threats, harassment, shift change and unwarranted reprimands collectively establish that defendants deliberately and jointly desired to intimidate plaintiff to the point that she would either quit her job or cease making complaints. Plaintiff testified that the pressure on her was almost intolerable. She was constantly criticized by Mills. As will be discussed more fully below, the stress and tension placed upon plaintiff by the defendants in the situation at Wade resulted in a partial, yet possibly permanent, loss of voice. As plaintiff's ability to

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nursing initiated investigation into malfeasance and wasteful practices at municipal hospital which resulted in her transfer and ultimate discharge: employers' actions were designed to "make it clear to . . . personnel that blowing the whistle would not be tolerated"); *Pilkington v. Devilacqua*, 439 F.Supp. 465, 474-75 (D. R.I., 1977) (mental hospital employee proved claim under § 1983 where his dismissal was motivated by fact that he aired grievances, made suggestions and identified deficiencies in administration of hospital).

speak became progressively worse, plaintiff stated that she became very depressed, uptight and cried frequently. Her frustration was only aggravated by the fact that her efforts at Wade had been futile. The court deems defendants' action to be outrageous especially when taking into consideration that the medical needs of several hundred inmates were the motivating factor behind plaintiff's actions. The well-being of those inmates was the duty expressly assigned to the LDC personnel of which defendants were a part.

Plaintiff's admittedly novel claim of retaliatory discharge under Louisiana law, however, is rejected. Plaintiff concedes that no courts in Louisiana have firmly held that such a cause of action exists. *See e.g., Gil v. Metal Service Corp.*, 412 So.2d 706 (La. App. 4th Cir. 1982) (retaliatory discharge claim dismissed because court found no statutory basis for cause of action). The essence of the retaliatory discharge claim is that an employee cannot be terminated for refusal to perform an illegal act, even in the absence of a statute. *Petermann v. International Brotherhood of Teamsters, Local 396*, 344 P. 2d 25, 29 (Cal. 1959). Since plaintiff has already been provided with an adequate remedy and Louisiana courts have not recognized a cause of action for retaliatory discharge, the court will exericse its discretion regarding pendant claims and decline consideration. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-26 (1966); *see generally*, 13B C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, §§ 3564, 3567 and 3567.1 (1984).[11]

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[11] Worthy of note, however, is that the evidence adduced at trial revealed that plaintiff was terminated because of exercising a legally

DAMAGES

The most apparent element of recovery to which plaintiff is entitled is compensation for the partial loss of her voice. All of the experts who testified at trial, including the expert provided by the defense, agreed that plaintiff's voice impairment was a type of functional dysphonia due to stress. The defendants' expert, Dr. Richard P. Bland, described plaintiff's condition as chronic and stated that the impairment could not have been inherited. Dr. Thomas E. Staats, a specialist in diagnosing and treating disorders due to stress in the work place, performed a battery of tests on plaintiff[12] and concluded that plaintiff suffered from severe occupational stress due to the hostile environment created by defendants.

Dr. Staats described plaintiff's voice as "barely audible" with a "breathy quality and periodic assimilated nasality." After listening to plaintiff's testimony, the court finds this description to be totally accurate.

The voice impairment has caused plaintiff considerable embarrassment and hindered her ability to effectively communicate thereby having a substantial and ad-

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protected right, specifically freedom of speech under the First Amendment. The evidence did not establish that plaintiff was terminated because of her failure to engage in illegal nursing practices. Accordingly, even if recognized, a claim for retaliatory discharge would fail.

[12] The particular tests utilized by Dr. Staats included the Stress Vector Analysis Test Battery, (including the Life Stressor Scale, Somatogenic Stressor Scale, Schedule of Recent Experience, Health Scale, Johns-Hopkins Symptom Checklist -- 90 -- revised, the Type A Behavior Scale, and the Hubbard-Staats Dissumulation Scale), the Millon Clinical Multiaxial Inventory, Psychophysiological Baselines, Psychophysiological Profile Analysis, and a clinical interview.

verse affect on plaintiff's performance as a registered nurse. Plaintiff's impairment had persisted without substantial improvement, as evidenced by Dr. Staats' testimony, for nearly four years. The condition is potentially permanent.[13]

Under the supervision of Dr. Staats, plaintiff underwent a stress management program between April 26, 1986 and May 16, 1986. Slight improvement in communication ability was noted. Dr. Bland, as well as one of plaintiff's experts, testified that intensive speech therapy would be necessary to possibly aid the impairment. Based upon the foregoing, the court believes that an award of $50,000 is appropriate due to plaintiff's loss of voice. In addition, the court believes that an award of $20,000 for past and future medical expenses incurred due to diagnosis and treatment of plaintiff's impairment is also reasonable.[14]

The next appropriate element of recovery is for mental anguish and suffering. The threats and harassment discussed above in relation to the qualified immunity defense and plaintiff's pendant state claim provide the basis for this element of recovery. In addition, plaintiff testified that upon reinstatement by the Civil Service Commission, she was not permitted to work the shift that she desired and was entitled to by virtue of her seniority.[15]

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[13] Dr. Staats testified that it was a "toss-up" whether plaintiff's impairment would ever improve.

[14] The award of medical expenses is based on past doctors' bills totalling $2,999, approximately $8,000 for treatment in the stress management program and the remainder for future speech therapy treatment.

[15] At trial, the defense objected to introduction of any evidence whatsoever concerning actions, events or medical expenses subse-

This shift change was denied despite intervention on plaintiff's behalf by Assistant Warden Henderson. Although another individual was hired for the shift that plaintiff was forced to work, the new employee was kept on the preferred shift. Plaintiff also testified that upon reinstatement the harassment continued. Specifically, plaintiff received numerous telephone calls during the two nights immediately after she resumed work. In addition, a police officer was sent to plaintiff's home at 6:00 A.M. on the Saturday morning following her reinstatement to question her concerning the location of insulin that had been reported missing from the medical department at Wade. Perhaps the most distressing part of plaintiff's reinstatement, however, was the fact that plaintiff observed continuing nursing violations with the only improvement being in the effort to cover up. Accordingly, the court deems an award of $20,000 for mental anguish and suffering to be reasonable.

Based upon plaintiff's uncontroverted testimony and

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quent to plaintiff's reinstatement. The basis for defendants' objection was that the evidence would have the effect of expanding the complaint since allegations contained therein did not involve any post-reinstatement events. The court ordered the parties to submit memoranda of authorities on this issue. The defense has not complied. Nonetheless, the evidence was appropriately admitted. The court does not view the evidence as creating either a new legal theory or a new cause of action but rather as relevant regarding the issue of damages. Moreover, the fact that plaintiff's complaint only seeks $1,000 in medical expenses does not preclude this court from granting a higher award. "This contention is clearly without merit because it has long been settled that federal courts are not bound by the pleadings and may fashion any relief appropriate under the circumstances. *Baltezore v. Concordia Parish Sheriff's Department*, 767 F.2d 202, 207 (5th Cir. 1985); *see also*, Fed. R. Civ. P. 54(c).

tax returns for years 1984 and 1985, the court will also award $10,000 in damages due to lost wages. Finally, punitive damages are to be awarded if official conduct is motivated by evil intent or demonstrates a reckless or callous indifference to constitutional rights. *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Thompkins v. Belt*, No. 86-4187, slip at 6633 (5th Cir., Sept. 29, 1987). Mills and Guillory advised plaintiff that if she persisted in her efforts to remedy the illegal nursing practices that she would be terminated. The threat was realized. Davoli testified that he never questioned the foundation of plaintiff's allegations but merely sought to bring the problems at Wade to a close. His solution, recommending that plaintiff be discharged, along with the threats, harassment and criticism by Guillory and Mills demonstrate to the court both motivation by evil intent and a reckless and callous indifference to plaintiff's rights under the First Amendment. In the hope of deterring future conduct of this nature by defendants, the court deems appropriate an award of $25,000 in punitive damages.

Plaintiff is also entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988. Resolution of the issue of attorney's fees will be by regular motion practice or, alternatively, joint stipulation. Memoranda of law addressing the issue of attorney's fees must include an analysis of the guidelines provided in *Blom v. Stenson*, 465 U.S. 886 (1984) and *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974); *see also Brantley v. Surles*, 804 F.2d 321 (5th Cir. 1986).

A judgment consistent with the terms of this memorandum opinion shall issue herewith.

THIS DONE AND SIGNED in Shreveport, Louisiana, this 2nd day of November, 1987.

APPENDIX E

In The United States District Court for the Western District of Louisiana Shreveport Division

JANICE FRAZIER
VERSUS
JOHN T. KING ET AL

Civil Action No. 84-2189
Judge Tom Stagg

ORDER

For the reasons set out in the foregoing memorandum ruling,

IT IS ORDERED that the decision of the State Civil Service Commission dated July 9, 1984 be given preclusive effect in plaintiff's action under 42 U.S.C. § 1983;

IT IS FURTHER ORDERED that the parties submit legal memoranda on the issue of qualified immunity no later than 5:00 P.M. on Friday, August 28, 1987.

DATED AND SIGNED at Shreveport, Louisiana, this 24th day of August, 1987.

TOM STAGG, CHIEF JUDGE

APPENDIX F

In The United States District Court for the Western District of Louisiana Shreveport Division

JANICE FRAZIER
VERSUS
JOHN T. KING ET AL

Civil Action No. 84-2189
Judge Tom Stagg

MEMORANDUM RULING

Plaintiff asserts, *inter alia*, a cause of action pursuant to 42 U.S.C. § 1983. Plaintiff contends that defendants wrongfully terminated her from employment as a nurse at the Wade Correctional Center in violation of her First Amendment rights. Plaintiff appealed her termination to the appropriate administrative agencies and, on July 9, 1984, the Louisiana Civil Service Commission ordered that plaintiff be reinstated with backpay and that all references to the termination be expunged from her personnel folder. The Civil Service Commission's determination was based on a conclusion "that appellant's constitutional right to speak out about the nursing practices at Wade and to supply the Nursing Board with copies of inmate medical records was significantly outweighed by

the Department of Corrections' need to maintain discipline among its employees."

Presently before the court is a motion by plaintiff that the determination of the Civil Service Commission be given preclusive effect with regard to her § 1983 claim. There is no dispute that the factual and legal arguments made both by plaintiff and defendants in the case at bar are the same as those presented to the Civil Service Commission.

ANALYSIS OF LAW AND FACTS

The United States Supreme Court recently addressed the application of administrative *res judicata* in § 1983 actions and held:

> that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate' [citation to *United States v. Utah Construction and Mining Company*, 384 U.S. 394 (1966)], federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the state's courts.

University of Tennessee v. Elliott, _____ U.S. _____, 106 S. Ct. 3220, 3227 (1986).

JUDICIAL CAPACITY:

Under the *Elliott* standard, *supra*, this court must first determine whether the Louisiana Civil Service Commission acted in a judicial capacity when it concluded that plaintiff should be reinstated and that her First Amendment rights had been violated. According to the Restatement (2d) of Judgments § 83 at 266 (1982), an administrative agency acts in a judicial capacity, and its de-

terminations are entitled to preclusive effect, when its procedures entail the essential elements of an adjudication; specifically, adequate notice, the right of parties to present evidence on their own behalf and to rebut evidence presented by the opposition, a formulation of issues of law and fact, a final decision, and the procedural elements necessary to preclusively determine the issue in question.

Art. 10 § 12(a) of the Louisiana Constitution provides:

> The State civil Service Commission shall have the exclusive power and authority to hear and decide all removal and disciplinary cases, with subpoena power and power to administer oaths. It may appoint a referee, with subpoena power and power to administer oaths, to take testimony, hear, and decide removal and disciplinary cases.

Jurisprudence interpreting art. X § 12(a) reveals that the exclusive jurisdiction of the Civil Service Commission over removal and disciplinary cases affords the Commission the same authority as a trial court. *Foreman v. Falgout*, 503 So.2d 517, 518-19 (La. App. 1st Cir. 1986) (exclusive jurisdiction granted to civil service commission precluded employee from suing his supervisor and employer in district court for alleged intentional interference with his job); *Barenis v. Gerace*, 357 So.2d 892, 894 (La. App. 1st Cir.), *writ denied*, 359 So.2d 1308 (La. 1978) (plaintiff's suit in district court seeking promotion by virtue of the terms of the Union contract was precluded due to exclusive jurisdiction over matter by Civil Service Commission); *Rayborn v. Louisiana Health and Human Resources Administration*, 349 So.2d 903, 904 (La. App.

1st Cir. 1977) (Civil Service Commission had exclusive jurisdiction when plaintiff, an Attorney III, filed suit seeking a declaratory judgment and injunction to prevent his removal or discipline for the failure to perform notarial services); *see also, LSU Medical Center, Shreveport v. Dickey*, 448 So.2d 214, 215 (La. App. 1st Cir. 1986) (the standard of review in cases on appeal from the Commission is the same standard used in reviewing decisions from the trial courts: factual determinations of the Commission will not be set aside unless they are shown to be manifestly erroneous); *Williams v. Department of Public Safety, etc.*, 415 So.2d 543, 544 (La. App. 1st Cir. 1982) (same); *Thoreson v. State Department of Civil Service*, 396 So.2d 367, 368 (La. App. 1st Cir. 1981) (judicial jurisdiction of State Civil Service Commission is restricted to removal, disciplinary and discrimination cases).

Art. X § 12(a) of the Louisiana Constitution and applicable case law clearly reveal that the State Civil Service Commission acts in a judicial capacity when determining whether a discharge was proper. *Counsel for plaintiff and the State* argued and presented evidence before the State Civil Service Commission. Based on the evidence presented, the Commission made 53 findings of fact, followed by a separate section entitled "Conclusions of Law." Pursuant to art. X § 12(a), *supra*, the State had the opportunity to appeal the Commission's decision to the appropriate state court of appeal. Since no appeal was taken, however, the Commission's determinations became final. *Thomas v. Department of Corrections*, 430 So.2d 1153, 1155 (La. App. 1st Cir. 1983).

RES JUDICATA UNDER LOUISIANA LAW:

The essential elements of *res judicata* are codified in

La. Rev. Stat. Ann. § 13:4231 (former Civil Code art. 2286):

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

THING DEMANDED:

The essence of the "thing demanded" requirement is that the actions or subject matter complained of must be alike. *Ryan v. Grandison Trust*, 504 So.2d 844, 849 (La. 1987) (identity of thing demanded between present suit and prior suit existed where each sought a declaration that a mineral servitude should be extinguished); *Scurlock Oil Company v. Getty Oil Company*, 294 So.2d 810 (La. 1974) (identity of thing demanded present because each suit sought cancellation and termination of identical leases obtained by the lessee from the land owners at approximately the same time); *Quarlas v. Lewis*, 75 So.2d 14 (1954) (identity of thing demanded existed where both action sought right of ownership in oil, gas and mineral rights); *Sibley v. Natchitoches Parish Police Jury*, 509 So.2d 637, 639 (La. App. 3d Cir. 1987) (identity of thing demanded, *i.e.*, the things complained of, were the same where a job applicant alleged employment discrimination on the basis of race in both actions); *Heine v. Muse*, 206 So.2d 529, 531-32 (La. App. 1st Cir. 1968) (that first suit was for a money judgment on a note while second suit was for damages was irrelevant in determining the identity of the thing demanded where the relief sought in both suits was a determination of the validity of a contract of sale).

Plaintiff sought to prove, *inter alia*, before the State Civil Service Commission, that her discharge was the result of First Amendment violations. Plaintiff's cause of action pursuant to § 1983 before this court is precisely the same. There is no dispute among the parties that defendants were acting in their official capacities under the color of state law. Thus, the "thing demanded" in both actions seeks a determination concerning the lawfulness of plaintiff's discharge with respect to her First Amendment rights.

SAME CAUSE OF ACTION:

Jurisprudence firmly establishes that the phrase "cause of action" resulted from a misunderstanding of the French word "cause" used in the Civil Code of 1808; in short, the French word "cause" does not mean the same thing as the common law phrase "cause of action." *Ryan v. Grandison Trust*, 504 So.2d at 850. The Louisiana Supreme Court has held that "cause" should be equated with the juridical or material fact which is the basis of the right claimed or the defense pleaded. *Id.*, *citing Mitchell v. Bertolla*, 340 So.2d 287 (La. 1976). "Cause is the principle upon which a specific demand is grounded while cause of action embraces the cause and the demand and is related to the party making the demand." *Id.* at 291.

The cause or basis upon which plaintiff demanded reinstatement before the Civil Service Commission was that her discharge was improper as being in violation of her First Amendment rights. Plaintiff is now asserting the identical cause in her § 1983 claim. Thus, the "same cause of action" requirement of R.S. 13:4231 is satisfied.

IDENTITY OF PARTIES:

There is *no requirement that the parties* be actually the same physical parties, but only that *they are the same parties in the legal sense of the word. Safeco Insurance Company of America v. Palermo*, 436 So.2d 536, 537 (La. 1983) (parties represented by their successors or others appearing in the same quality suffice); *Scurlock Oil Company v. Getty Oil Company*, 294 So.2d at 815. Although the defendants *named in this suit were not the "named" defendants* in plaintiff's action *before the State Civil Service Commission*, the *legal quality is identical*. The Louisiana Department of Corrections, Wade Correctional Center, was the designated appellee in the action before the Commission. The enumerated actions complained of in plaintiff's appeal to the Commission involved alleged wrongful actions by certain defendants in plaintiff's § 1983 case. The Commission's findings of fact established that the complained of actions by certain defendants herein constituted a violation of Ms. Frazier's First Amendment rights. Legal representation for the Department of Corrections in the Civil Service appeal and defendants in the case at bar has been provided by the Louisiana attorney general's office. The factual and legal arguments asserted by the State in both actions are identical. Thus, that the parties are the same in the legal sense of the word cannot seriously be disputed.

RES JUDICATA AND THE CIVIL SERVICE COMMISSION'S DECISION:

The final question to be addressed under *Elliott*, *supra*, is whether state courts would afford the Civil Ser-

vice Commission's decision *res judicata* effect. Pursuant to art. X § 12(a) of the Louisiana Constitution, the State had 30 days within which to appeal the Civil Service Commission's determination. No appeal was taken.

As stated above, "the authority of the thing adjudged takes place only with respect to what was the object of the judgment." R.S. 13:4231. "Thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal." La. Civ. Code Ann. art. 3556 (31). Louisiana jurisprudence firmly establishes that the determination of an administrative agency is to be given *res judicata* effect once the time for appeal has expired. *Hospital Corporation of America v. Robinson*, 506 So.2d 936 (La. App. 1st Cir. 1987) (if the time fixed by law for appealing an administrative decision has elapsed, the ruling in question becomes final and is *res judicata*); *Coleman v. Commission on Ethics for Public Employees*, 439 So.2d 451, 453 (La. App. 1st Cir. 1983); *Thomas v. Department of Corrections*, 430 So.2d 1153, 1155 (La. App. 1st Cir. 1983) (decision of Civil Service Commission becomes final and is *res judicata* if the time fixed by law for appealing has elapsed).

CONCLUSION

The foregoing analysis establishes that under the Supreme Court's holding in *University of Tennessee v. Elliott*, *supra*, and applicable Louisiana law, the determination by the State Civil Service commission should be afforded preclusive effect as applied to plaintiff's action

under 42 U.S.C. § 1983. This means that plaintiff need not establish a violation under 42 U.S.C. § 1983. The *preclusive effect* of the Civil Service Commission's determination, however, is *limited to the defendants* who were *acting in their official capacities* and had a causal connexity with plaintiff's wrongful discharge, *specifically, Charles S. Davoli, Donald R. Guillory and Linda Mills.* The State Civil Service Commission's decision cannot be preclusive against the remaining defendants, since the findings of fact contained in the decision did not establish any causal connection between these individuals and the plaintiff's wrongful discharge. *Howard v. Fortenberry*, 723 F.2d 1206, 1212 (5th Cir. 1984).

Even though plaintiff is relieved from proving a § 1983 violation by virtue of *Elliott* and the Commission's decision, the issue remains whether defendants are entitled to qualified immunity. Since defendants have properly asserted this defense by contending that plaintiff violated departmental rules by sending inmates' records to the Nursing Board without their consent, the burden shifts to plaintiff to establish that, at the time the defendant officials acted, they violated clearly established law of which a reasonable person would know. *Anderson v. Creighton*, _____ U.S. _____, 107 S. Ct. 3034, 3038-39 (1987); *Whatley v. Fhilo*, 817 F.2d 19, 20 (5th Cir. 1987). As the Supreme Court held in *Anderson, supra*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preex-

> isting law the unlawfulness must be apparent. (citations omitted)

107 S. Ct. at 3039.

Whether defendants' actions resulting in plaintiff's discharge violated "clearly established" law is an issue which the parties must address in memoranda to be filed no later than 5:00 P.M. on Friday, August 28, 1987. *Anderson, supra*, makes clear that for purposes of qualified immunity, violation of a general right under a constitutional amendment is insufficient. Rather, the circumstances surrounding Ms. Frazier's discharge must also be taken into consideration. 107 S. Ct. at 3039-40.

An order consistent with the terms of this memorandum ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana this 24th day of August, 1987.

APPENDIX G

OPINION

DATED: July 9, 1984.

FILED: July 9, 1984.

IN RE: Appeal of Janice Frazier (Department of Corrections, Wade Correctional Center)

State of Louisiana
Civil Service Commission
Dockiet No. 4034

STATEMENT OF THE APPEAL

Appellant was employed by the Department of Corrections at Wade Correctional Center as a Registered Nurse II, and was serving with permanent status.

By letter dated August 10, 1983, over the signature of Charles R. Davoli, Assistant Secretary of Adult Services, appellant was advised that she was being removed from her position effective August 19, 1983. As cause for this action, appellant is charged with violating Department of Corrections Employee Rules and Procedures #13(K) which requires that only authorized employees shall disclose confidential information contained in any file of the Department, and then only to persons authorized to receive the information and #6 which requires employees to obey all authorized regulations, policies and

procedures including department regulations, institutional directives and all other written procedures and policies. Specifically, the letter of removal states that on April 26, 1983, during a meeting with Mr. Davoli, Warden Guillory, Assistant Warden Henderson and Linda Mills, appellant admitted copying medical records and releasing those records to the Nursing Board without authorization from anyone in authority; that appellant failed to comply with Department Regulation 10-11 of April 15, 1976 and Warden Guillory's memorandum of October 3, 1979 in that she failed to place in those medical records consent forms signed by the inmates whose records had been released; and that by appellant's own admission she had released three or four records, but was unsure of the exact number.

On September 6, 1983, counsel on behalf of appellant filed an appeal. As the action complained of reference is made to the termination. Appellant avers that the action taken against her was discriminatory and retaliatory in nature; that she was denied due process; and that she was denied her right to freedom of expression. Thereafter, appellant recites a series of events beginning around November 1981, wherein she allegedly discovered serious infractions of the nursing profession, abuses of patients, serious infractions of the Department of Corrections departmental policies and violations of the laws of the State of Louisiana. Appellant states further that from November 1981 to October 1982, she sought to no avail to have these infractions corrected by her immediate supervisor, the Warden of Wade Correctional Center and the Assistant Warden of Wade Correctional Center; that between August 1982 and October 1982, she and another former

employee of Wade reported their suspicions to an employee of the Department of Corrections headquarters and to an employee of the Louisiana State Board of Nursing; that as a result of the reports made to Corrections headquarters and the Louisiana State Board of Nursing, an investigation was conducted which culminated in a consent order on May 23, 1983, between the Louisiana State Board of Nursing and appellant's supervisor and another nurse at Wade Correctional Center; that during the time of the investigation conducted by the Louisiana State Board of Nursing and prior to the consent order, the Department of Corrections began taking retaliatory action against appellant; that on April 15, 1983, the Department of Corrections, through appellant's immediate supervisor, caused a verbal reprimand to be issued against appellant for failing to report to duty despite the fact that appellant had followed the normal procedure for calling in sick; that on May 10, 1983, Mr. Charles Davoli filed a disciplinary report against appellant wherein Warden Guillory recommended that appellant be terminated; that on July 29, 1983, an internal grievance hearing was conducted by Michael Martin, Undersecretary of the Department of Corrections; that counsel for appellant was not given an opportunity to present evidence at this hearing; that Mr. Davoli upheld Warden Guillory's recommendation that appellant be terminated; and that appellant received notice of her termination on August 12, 1983. As relief, appellant seeks to be reinstated with back pay and medical assistance to rectify the emotional and physical damage to her health caused by the actions of the Department of Corrections and to receive any other relief available.

Public hearings were held on December 15, 1983 and January 24, 1984, in Shreveport, before a Referee appointed by the commission. Based on the argument of counsels and the evidence presented at the hearing and pursuant to Article X, Section 12(A) of the Louisiana Constitution of 1974, as amended in 1982, the Referee makes the following findings.

PRELIMINARY MATTERS

At the outset of the hearing on the merits, counsel on behalf of the appellee requested Summary Disposition of this appeal. As the grounds for dismissal, appellee argues that appellant does not deny the charges against her, rather appellant states that the action taken was discriminatory and retaliatory; that appellant has failed to plead specific facts in support of her conclusion of discrimination and retaliation as required by Civil Service Rule 13.11(d); that appellant had alleged denial of due process because the Department of Corrections failed to grant appellant a pre-termination hearing or that the pre-termination hearing held was not in accordance with due process and Civil Service has no jurisdiction to hear appeals of internal agency hearings; and that Civil Service has no jurisdiction to hear an appeal based on freedom of expression. Alternatively, appellee argues that if it is determined that appellant has alleged specific facts to present a case of discrimination and retaliation, that appellant should be required to open the case [Civil Service Rule 13.19(r)] inasmuch as she has failed to deny the charges against her.

The Referee herein adopts and confirms the oral ruling made at the hearing wherein appellee's Request for

Summary Disposition was denied. The Referee ruled that appellant had properly alleged facts in support of her allegations of discrimination and retaliation and that appellant was entitled to present evidence of that nature insofar as the specific facts supporting those allegations were set out in the letter of appeal. Furthermore, pursuant to Civil Service Rule 13.19(s) the Referee required the Department of Corrections to open the case.

FINDINGS OF FACT

1. Appellant's immediate supervisor was Linda Mills, RN III. Ms. Mills is the Medical Supervisor of the Infirmary at Wade Correctional Center (hereinafter called Wade).

2. Ms. Mills' nursing supervisor is Valerie Ibert, Assistant Administrator for Adult Health Care. Ms. Ibert is also an RN IV. Ms. Ibert's duty station is the Department of Corrections Headquarters in Baton Rouge. Ms. Mills' administrative supervisor at Wade is Warden Don Guillory.

3. In late June 1982, appellant and Ms. Bonita Nolan, now a former nursing employee at Wade, began complaining to other employees at Wade about the nursing practices at the infirmary.

4. Appellant and Ms. Nolan spoke with Dr. Kahout, a contract physician regarding their concerns and also to Assistant Warden Robert Henderson.

5. Ms. Nolan and appellant were concerned that the inmates were being denied medical care as punishment, that nurses were changing doctors order without consulting the doctor first and without documenting the

changes in the inmates' charts, that nurses were completing blank prescription forms and duty status forms which had been previously signed by a doctor, that nurses were making medical diagnoses and that nurses were withholding or substituting medications without consulting doctors, all in violation of the nursing practices act.

6. On July 2, 1982, Ms. Mills verbally reprimanded appellant and Ms. Nolan for speaking with Dr. Kahout. Ms. Mills told appellant and Ms. Nolan that they had not followed the "chain of command."

7. Later, the first week in July, appellant and Ms. Nolan called Valerie Ibert and told her about the nursing practices at Wade. Ms. Ibert requested and appellant and Ms. Nolan sent to Ms. Ibert, copies of several inmate medical records.

8. Around July 15, 1982, Ms. Ibert and Dr. Vance Byars, Medical Consultant for the Department of Corrections, made a routine visit to evaluate the medical facilities at Wade.

9. While Dr. Byars and Ms. Ibert were at the facility, appellant and Ms. Nolan made copies of other documents and gave them to Ms. Ibert.

10. As a result of the July 15, 1982 visit Dr. Byars and Ms. Ibert wrote a memorandum dated August 3, 1982 to Mr. Zed Van Buren, Director of Audit Medical Services, Department of Corrections.

11. In the memorandum, Mr. Van Buren was advised that overall health care at Wade was good and that there were a few minor administrative problems that Ms. Mills was instructed to correct.

12. Appellant and Ms. Nolan testified they these problems were never corrected and the nursing practices remained as before. Appellant and Ms. Nolan continued to contact Ms. Ibert about these practices.

13. In late August 1982, while Ms. Mills was on vacation, appellant and Ms. Nolan made copies of documents other than the inmate medical records.

14. Several other nursing employees witnessed the flurry of activity and several heard either or both appellant and Ms. Nolan say that while Ms. Mills was out, they were going to gather enough information to legally hang her.

15. Ms. Nolan and appellant continued to complain because they felt they were subject to losing their nursing licenses if certain practices were not discontinued.

16. Assistant Warden Henderson directed memoranda to the nursing staff that changes were to be made. Ms. Nolan testified that these memoranda went unheeded by Ms. Mills and were thrown in the garbage can.

17. Early in September 1982, an inmate wrote a letter to the Department of Corrections headquarters complaining of the way in which he was being handled by the nursing staff at Wade and alleging that he had been denied access to medical care.

18. Dr. Byars had also learned that Dr. Kahout and Dr. Cockran, another contract physician, were resigning because of differences with the nursing staff at Wade.

19. As a result, Mr. Van Buren asked Dr. Byars and Ms. Ibert to conduct another evaluation of the medical fa-

cilities and nursing practices. Dr. Byars and Ms. Ibert, therefore, visited Wade again on September 16, 1982.

20. Ms. Ibert took with her to Wade on September 16, 1982, copies of the inmate-medical records that had been sent to her by appellant. While there, Ms. Ibert compared the copies with the originals.

21. During this visit Dr. Byars primarily discovered errors in nurses' charting. Dr. Byars felt that these errors were serious breaches of nursing practice and department regulations.

22. Dr. Byars testified that he had not found such serious violations in his July visit. He further testified that there was no immediate danger to inmate life because of the errors, but that the potential for life endangering situations was present.

23. After the September visit, Ms. Ibert and Dr. Byars spoke with Drs. Kahout and Cockran who confirmed the allegations made by appellant and Ms. Nolan. Drs. Kahout and Cockran made their own allegations regarding the nursing practices at Wade, also.

24. In October 1982, appellant again called Ms. Ibert and told her that the violations Dr. Byars and Ms. Ibert had found had not been corrected. Appellant also told Ms. Ibert that she was being harassed by Ms. Mills and Warden Don Guillory.

25. Ms. Ibert told appellant that she had made a report of her findings to Mr. Van Buren and that he would take care of it.

26. Around the first week of October, 1982, Warden Guillory had a staff meeting wherein he advised the nurs-

ing staff of Wade that what went on at Wade is no one's business.

27. On October 21, 1982, Ms. Mills filed a DR-1 against appellant for aggravated malfeasance. The DR-1 states: "After incident caused by this employee in September, Warden Guillory had a meeting with nursing staff to halt further disruption. This employee was instructed to make an attitude adjustment. Ms. Frazier has continued to 'Nit Pick' the other nurses and myself as supervisors, questions, or makes derogatory remarks about everything she is ordered to do. Makes slanderous untrue statements in the Report Log which is permanent record. Spends the majority of her shift perusing records from day shift looking for errors to record in the Log Book. She has questioned inmates regarding things done or not done by other nurses to belittle and discredit their abilities. This disruptive behavior has caused a tremendous problem in the infirmary and must be stopped. Reprimands have done no good." Ms. Mills recommended that appellant receive a five-day suspension for this offense.

28. Appellant testified that the DR-1 was not processed because Wardens Guillory and Henderson felt it was unjustified.

29. Appellant further testified that during October, Ms. Mills constantly criticized her work and that Ms. Mills changed the work schedule such that only appellant and Ms. Nolan were required to work on weekends.

30. Throughout October and November, 1982, violations of the nursing practices act continued at Wade and appellant had heard nothing further from Ms. Ibert.

31. Around the first week of December, appellant again spoke with Warden Guillory and told him that if changes were not made she would have no other choice but to go to the Nursing Board. Appellant testified that Warden Guillory's reply was that she would be fired if she went to the Nursing Board.

32. On December 20, 1982, appellant called Sister Lucie Leonard, State Nursing Consultant, Louisiana State Board of Nursing. Appellant told Sister Lucie that she wanted to report someone who was violating the nursing practices act. Sister Lucie told appellant that a complaint must be in writing and that any evidence in support of the complaint would be helpful.

33. Sister Lucie could not recall if she specifically told appellant to send copies of inmate medical records. However, Sister Lucie also testified that had appellant asked her if she needed such records, she would have replied affirmatively. Thereafter, Sister Lucie sent appellant a pamphlet entitled *"Louisiana State Board of Nursing, Disciplinary Proceedings for Registered Nurses, Guidelines for Reporting Violations of the Nurse Practice Act of Louisiana and Rules and Regulations of the Board of Nursing.*

34. Sister Lucie had no authority to direct or order appellant to secure documents.

35. Sister Lucie further testified that if appellant had not supplied the inmates' medical records she would have found a way to get them herself.

36. On December 27, 1982, Sister Lucie received from appellant excerpts from the medical records of nine inmates together with nine consent forms signed by those

inmates. Later Sister Lucie received more medical records, this time without consent forms.

37. After receiving and reviewing the documents, Sister Lucie contacted Ms. Ibert and asked Ms. Ibert if she could verify the documents and information she had received from appellant. Ms. Ibert told Sister Lucie of the September visit, that she had copies of the same documents and that she had verified the contents thereof by comparing them with the originals. Subsequently Ms. Ibert sent copies of the same documents to Sister Lucie.

38. Ms. Ibert testified that it was all right for appellant to have sent to her copies of inmates' medical records which Ms. Ibert subsequently furnished to Sister Lucie; but it was against the Department of Corrections policies and procedures for appellant to have forwarded the same records directly to Sister Lucie.

39. Ms. Ibert did not send consent forms signed by the inmates whose records she forwarded to Sister Lucie. Ms. Ibert testified that she did not need to have consent forms signed by these inmates in order to supply other parties with copies.

40. Afterwards, Sister Lucie requested a meeting with Messes. Ibert, Nolan and appellant and on January 24, 1983, all four ladies met at the Holiday Inn in Ruston.

41. After the meeting with appellant and Ms. Nolan, Sister Lucie and Ms. Ibert went to Wade to again inspect the same inmate records and to verify the information supplied by appellant and Ms. Nolan.

42. While at Wade, Sister Lucie talked with Warden Guillory and Ms. Mills. She also inspected the reports

and asked Ms. Mills to provide her with copies. Some copies were provided to Sister Lucie that day. If copies were not supplied, Sister Lucie was given a reason therefor and the requested documents were later sent to her by Valerie Ibert.

43. Sister Lucie felt that the allegations made by appellant with regard to the nursing practices at Wade were valid.

44. On February 14, 1983, formal complaints were filed against Ms. Mills and Ms. Gloria Calla, RN at Wade. The complaint charged Messes. Mills and Calla with violation of the Louisiana Nursing Practice Act by being "unfit or incompetent by reason of negligence, habit or other causes" and "aiding or abetting . . . in the violation of any provision of" the act.

45. Based upon examination of the evidence that would have been adduced before the Board in support of the charges, a discussion with Messes. Mills' and Calla's legal counsel and the counsel's representations as to the evidence which would have been presented in defense of Messes. Mills and Calla, explaining the propriety and/or necessity of their questioned professional actions at Wade under the operative circumstances at the time of the incidents alleged, the Board concluded that its interest in instituting the proceedings against Messes. Mills and Calla and the public health and safety would be adequately and best served by rectification of certain nursing practice procedures by registered nurses at Wade. Therefore, the Board's legal staff recommended disposition of these proceedings by entry of a consent order.

46. Messes. Mills and Calla neither admitted nor ex-

pressly denied any violation of the Act and waived their right to a hearing and final decision.

47. Messes. Mills and Calla therefore consented to the entry of an order which in essence provided that they would no longer practice nursing procedures which had previously been alleged by appellant and Ms. Nolan.

48. It was further ordered by the Board that any violation of the mandates set forth in the consent decree would be deemed just cause for the suspension or revocation of Messes. Mills' and Calla's nursing licenses or for such other disciplinary action as the Board would deem appropriate.

49. The consent decrees were acknowledged and accepted by Messes. Mills and Calla on May 14, 1983 and May 16, 1983, respectively.

50. On February 16, 1983 and April 26, 1983, Mr. Charles Davoli, former Assistant Secretary of Adult Services, made a fact finding visit to Wade because appellant had written a letter to John King, former Secretary of Corrections regarding the nursing practices at Wade. Mr. Davoli talked with the nursing staff who were told that they were obligated to give him specific information regarding violations of the nurse practice act. None of the nurses had anything to report.

51. Between Mr. Davoli's first and second visit, appellant had forwarded other documents to Sister Lucie. This occurred around March 3, 1983.

52. On or about March 24, 1983, former Secretary King asked Mr. Edward Mills, Corrections Internal Affairs Officer to investigate the situation at Wade.

53. By memorandum dated March 31, 1983, to former Secretary King, Mr. Mills reported: ". . . with one possible exception, Wade Medical policies and procedures are *presently* in accordance with departmental regulations. . . . There were deficiencies in the health delivery system at Wade. These were reported to Wardens Henderson and Guillory by Nurse Frazier, (appellant) and to Mr. Zed Van Buren by Dr. Byars and Nurse Ibert. No action was taken by the Wardens after the situation was reported to them. Mr. Van Buren did not advise acting Assistant Secretary Woodruff nor Warden Guillory of the situation as reported to him. . . . In the course of gathering information for this report, I discovered evidence that Nurse Valerie Ibert may have encouraged Nurse Janice Frazier in her out-of-channel communications."

54. The parties made the following stipulations:

STIPULATIONS

Appellant received the Department of Corrections Employee Rules and Procedures, the Department of Corrections Department Regulation No. 10-11 and the Wade Correctional Center Employee Rule Book.

Frazier #20 and #21 were produced pursuant to a subpoena duces tecum by Sister Lucie Leonard and were maintained in a file in the control and custody of the Louisiana Board of Nursing.

Ms. Odom, LPN at Wade would testify the same as Gloria Calla, RN at Wade and Debbie Scribber, RN at Wade except for the conversation between Scribber and Nolan.

Mr. Van Buren discussed in a general manner the contents of the memorandum Ms. Ibert and Dr.

Byars wrote to him after the September 1982 visit. Mr. Van Buren expressed concern about the charges if they were true.

CONCLUSIONS OF LAW

The Referee concludes that the Department of Corrections has failed to sustain the burden of showing that the disciplinary action taken was warranted in this case. Appellant is charged, by the Department of Corrections with releasing confidential inmate medical records to the Louisiana Board of Nursing. The real, unwritten charge however, is that appellant breached her duty of loyalty to support her superiors and maintain silence regarding internal agency affairs.

The Referee further concludes that appellant was legally, morally and ethically obligated to pursue the course of action that she did. Appellant tried unsuccessfully to bring about changes in the nursing practices at Wade by first going through the chain of command at Wade. The Nursing Practices Act provides that not only can a registered nurse be disciplined for nursing practices that adversely affect the physical and psycho-social welfare of a patient; but, can also be disciplined for failure to report such practices. Under these circumstances, the Appellant's duty to report such violations to her licensing authority and to submit documentation in support thereof far outweighed her obligation to follow the Department of Corrections rules and regulations. In *Department of Corrections v. Cage*, 418 So.2d 3 (La.App. 1st Cir. 1982) the Court implied that if an agency's policy and order does not ask the employee to do anything illegal, immoral, unethical or in dereliction of the employee's duties, the

employee is bound to follow the order. Obviously, this was not the case in this appeal.

The public interest in having free and unhindered debate on matters of public importance is the core value of the Free Speech Clause of the First Amendments of the United States and Louisiana Constitutions. Equally as important is the right of the employee to engage in such speech without the threat of retaliatory dismissal by their employer. The rights of inmates to adequate medical care has been, for at least the last decade, a central issue in the Courts, and needless to say is of paramount concern to the public at large. "Speech concerning public affairs . . . is the essence of self-government." See *Garrison v. Louisiana*, 379 U. S. 64 74 - 75, 85 S. Ct. 209, 215 - 216. Such speech occupies the "Highest rung of the heirarchy of First Amendment values and is entitled to special protection." See *Connick v. Myers*, 103 S. Ct. 1684 (1982) and *Pickering v. Board of Education*, 391 U. S. 563, 88 S. Ct. 1731 20 L. Ed. 2d 811.

For the foregoing reasons, the Referee concludes that appellant's constitutional right to speak out about the nursing practices at Wade and to supply the nursing board with copies of inmate medical records is significantly outweighed by the Department of Corrections need to maintain discipline among its employees. The public interest is best served by appellant's actions and not those of the Department of Corrections. Additionally, appellant's actions promoted the efficiency of the service rendered. See *Legett v. Northwestern State College*, 140 So.2d 5 (1962).

Accordingly, this appeal is granted. Appellant is to be reinstated to her position effective August 19, 1983,

subject to an offset in favor of the appellee for all wages earned and unemployment compensation received by appellant during the time of her illegal separation. All references to the termination are to be expunged from appellant's personnel folder. Pursuant to Civil Service Rule 13.35 attorney's fees in the amount of $500.00 are awarded and are to be paid to appellant and her attorney jointly. Some disciplinary action should have been taken by the Department of Corrections in light of the facts presented in this case, but not against this employee. The Department of Corrections actions herein were blatantly unreasonable.

s/ Sheral A. Curry

Sheral A. Curry
Civil Service Commission Referee

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